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THE
RAILROADS
AND THE
COMMERCE CLAUSE.

BY
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MEMBER OF THE PHILADELPHIA BAR.

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PREFACE.

So much attention having been attracted to the subject of railroad legislation by the passage of the Interstate Commerce Act, and the litigation it has given rise to, and by the active steps taken in many States toward the regulation of railroads, it occurred to the author that the time was ripe for a work on the constitutional relations of the railroads to the National government, especially as those relations grow out of and are defined by the "Commerce Clause." In investigating this subject the author soon came to the conclusion, that this work would be incomplete if it did not also contain a consideration of the reciprocal effects of the National and State powers over railroads.

Although the present extremely undeveloped state of the law renders impossible a complete treatise on either of these subjects, the time may not be inopportune for a work in which are attempted to be laid down the lines of decision which the Courts are likely to follow. The aim of the author has, therefore, been twofold: First, to present the actual state of the law as defined by the decisions of the Supreme Court; second, from a careful study of the decisions already made, to endeavor to deduce the principles upon which, and the directions in which, the development of the law is likely to proceed; in other words, explain the present and predict the future attitude of the Supreme Court upon questions of railroad legislation already raised or likely to be raised.

PREFACE.

The citations have been chiefly confined to the decisions of the Supreme Court of the United States, the only tribunal which can decide authoritatively on constitutional questions, and have been given with their dates, as the latter have a very important bearing upon the weight which should be attached to them. The decisions of the Circuit Courts have been cited when illustrative of points not yet passed upon by the Supreme Court, but the decisions of the State Courts have only been noticed for purposes of criticism, as, on account of their natural bias on questions of this kind, they are more apt to be wrong than right.

A short appendix on the present status of the Interstate Commerce Commission has been added since the completion of the main body of the work.

CONTENTS.

	PAGE.
ANALYSIS	vii
INDEX OF CASES CITED	xv

PART I.

OF THE POWER OF CONGRESS, UNDER THE COMMERCE CLAUSE TO REGULATE RAILROADS	
--	--

CHAPTER I.

The General Nature of the Power of Congress over Commerce	1
---	---

CHAPTER II.

Of the Commerce Carried on by Railroads, which Congress may Regulate	5
---	---

CHAPTER III.

The Power of Congress to Regulate the Operation of Railroads	18
--	----

CHAPTER IV.

The Power of Congress to Construct Railroads	36
--	----

CHAPTER V.

Limitations upon the Power of Congress over Railroads	43
---	----

PART II.

THE COMMERCE CLAUSE AND STATE RAILROAD LEGISLATION	56
--	----

CHAPTER VI.

The Power of the State to Regulate Commerce	56
---	----

CHAPTER VII.

State Laws Regulating the Instrumentalities of Commerce	74
---	----

PART III.

THE COMMERCE CLAUSE AS AFFECTING STATE TAXATION OF	PAGE-
RAILROADS	106

CHAPTER VIII.

Taxation of Railroad Gross Receipts	106
---	-----

CHAPTER IX.

Taxation of Income and Fixed Property	119
---	-----

CHAPTER X.

Taxation of Rolling Stock	127
CONCLUSION	137
APPENDIX	141
The Present Status of the Interstate Commerce Commission .	141
INDEX	151

ANALYSIS.

PART I.

OF THE POWER OF CONGRESS, UNDER THE COMMERCE CLAUSE, TO REGULATE RAILROADS.

CHAPTER I.

THE GENERAL NATURE OF THE POWER OF CONGRESS OVER COMMERCE.

- Section 1. Phraseology of the Commerce Clause.
- “ 2. Manner in which the power is defined.
- “ 3. Character of the power conferred.
- “ 4. Laws incidental to the regulation of commerce.
- “ 5. Derivation of the power to regulate the instrumentalities
of commerce.

CHAPTER II.

OF THE COMMERCE, CARRIED ON BY RAILROADS, WHICH CONGRESS MAY REGULATE.

- Section 6. Classification of commercial regulations.
- “ 7. Geographical character of the commerce under Congress-
ional control.
- “ 8. The test of the character of the transportation.
- “ 9. Scope of the Interstate Commerce Act.
- “ 10. Extent of the power of Congress.
- “ 11. Illustrations of transportation not subject to the Interstate
Commerce Act.

- Section 12. Evils resulting from the limited scope of the Act.
- " 13. Impracticability of basing any system of commercial regulations upon the Federal theory.
- " 14. The power of Congress as extensive as the mischief.

CHAPTER III.

THE POWER OF CONGRESS TO REGULATE THE OPERATION OF RAILROADS.

- Section 15. Knowledge of commercial matters possessed by the framers of the Constitution.
- " 16. Meaning of phrase, "Regulate Commerce."
- " 17. What vessels are subject to the power of Congress.
- " 18. Examination of cases.
- " 19. Power of Congress over rivers and canals.
- " 20. Power of Congress over vehicles of commerce by land.
- " 21. Not confined to vehicles of interstate or foreign commerce.
- " 22. Nor to interstate or foreign trains.
- " 23. Power of Congress over the road-bed.
- " 24. Power of Congress not confined to civil legislation.
- " 25. Description of the railroads subject to Congressional control.
- " 26. The criterion by which to determine the liability to Congressional control.
- " 27. View of the Interstate Commerce Commission.

CHAPTER IV.

THE POWER OF CONGRESS TO CONSTRUCT RAILROADS.

- Section 28. River and Harbor Bills.
- " 29. The Cumberland Road and the Pacific Railroads.
- " 30. Railroad authorized by Congress cannot be obstructed by States.
- " 31. Congress may invest railroad with power of eminent domain.
- " 32. Railroad chartered by Congress need not have State charter.

CHAPTER V.

LIMITATIONS UPON THE POWER OF CONGRESS OVER RAILROADS.

- Section 33. Bearing of the Fifth Amendment on the power of Congress.

Section 34. Regulation of railroads not necessarily a taking of private property.

- “ 35. Power of Congress not conditional upon compensation being made.
- “ 36. The manner in which, and the extent to which, Congress may exert its power.
- “ 37. The reasonableness of rates must be determined by judicial machinery.
- “ 38. Proposed change in the Interstate Commerce Act.
- “ 39. The power to regulate not without limit.
- “ 40. View of Chief Justice Raney.
- “ 41. Observations on the powers of legislative bodies over the property of common carriers.

PART II.

THE COMMERCE CLAUSE AND STATE RAILROAD LEGISLATION.

CHAPTER VI.

THE POWER OF THE STATE TO REGULATE COMMERCE.

- Section 42. Effect of the grant to Congress, of the power to regulate commerce, upon the legislative powers of the States.
- “ 43. Character of the regulation suited to railway transportation.
 - “ 44. Distinction between regulating and affecting.
 - “ 45. Examination of cases.
 - “ 46. State “Police Powers.”
 - “ 47. Power of the State to regulate internal commerce.
 - “ 48. The criterion which determines the character of the commerce.

Section 49. Examination of cases.

- " 50. Illustrations of commerce under State control.
- " 51. An unsettled point.
- " 52. Practical bearings of the question.
- " 53. Examination of cases.
- " 54. Character of the commerce to which the State's power to regulate is confined.
- " 55. Effect of a conflict between National and State laws.

CHAPTER VII.

STATE LAWS REGULATING THE INSTRUMENTALITIES OF COMMERCE.

Section 56. The foundation of the State's power to regulate the instrumentalities of commerce, and limitations thereof.

- " 57. Examination of cases.
- " 58. Principles deducible from the cases.
- " 59. Derivations of the State's power to provide safe guards and safety appliances.
- " 60. Case of *Hall vs. De Cuir*.
- " 61. Case of *Western Union Telegraph Co. vs. Pendleton*.
- " 62. Difficulty in drawing the line between the powers of the State and the exclusive power of Congress.
- " 63. A criterion suggested.
- " 64. Practical applications of the criterion.
- " 65. Example of a commercial regulation under guise of a police law.
- " 66. Regulations of local commerce affecting interstate commerce.
- " 67. Laws requiring separation of white and colored passengers.
- " 68. Sleeping-car regulations.
- " 69. Automatic brakes, couplers, etc.
- " 70. Power of a State to regulate the use of its highways, natural and artificial.
- " 71. View of Massachusetts Railroad Commission.
- " 72. Effect of conflict between laws of different States.

Section 73. Attitude of the Supreme Court on this question.

- “ 74. Laws which impair the usefulness of property for inter-state commerce.
- “ 75. Present unlimited power of the States to regulate manner of operating railroads.
- “ 76. Remedy for the evils likely to arise.

PART III.

THE COMMERCE CLAUSE AS AFFECTING STATE TAXATION OF RAILROADS.

CHAPTER VIII.

TAXATION OF RAILROAD GROSS RECEIPTS.

Section 77. Considerations which limit the State's power of taxation.

- “ 78. Nature of the problem.
- “ 79. The State Freight Tax Case.
- “ 80. The State Tax on Gross Receipts Case.
- “ 81. *Fargo vs. Michigan*.
- “ 82. Subsequent history of the gross receipts case.
- “ 83. License tax for railroad agencies.
- “ 84. Change of base in *Maine vs. Grand Trunk Co.*
- “ 85. Probable results of the new doctrine.

CHAPTER IX.

TAXATION OF INCOME AND FIXED PROPERTY.

Section 86. Judicial utterances as to power of State to tax property of corporations.

- “ 87. Conditions subject to which the power must be exercised.
- “ 88. Extent of the power.

Section 89. Tax on net income.

- " 90. Difference between tax on net income and on gross receipts.
- " 91. Double taxation.
- " 92. Taxation of railroads chartered by Congress.

CHAPTER X.

TAXATION OF ROLLING-STOCK.

Section 93. General principles as to situs of personal property for purposes of taxation.

- " 94. Difficulty of applying these principles to the taxation of rolling-stock.
- " 95. Mr. Justice Brewer's reasoning in support of the Iowa method.
- " 96. Attitude of the Supreme Court on the Pennsylvania method.
- " 97. Manner in which such a tax must be imposed.
- " 98. Applicability of either method to taxation of freight cars.
- " 99. Mr. Justice Matthews' view.
- " 100. Nature of the problem and how its solution can be accomplished.

CONCLUSION.

Section 101. Dangerous nature of the powers residing in the State legislatures.

- " 102. The power of Congress to supervise State legislation.
- " 103. National importance of the railroads.
- " 104. By whom the solution of the "Railroad Problem" must be worked out.

APPENDIX.

THE PRESENT STATUS OF THE INTERSTATE COMMERCE COMMISSION.

Section 105. Attitude of the Circuit Courts towards the Commission.

- " 106. Effect of this attitude upon the enforcement of the Act.
- " 107. Proposed changes in the Act.
- " 108. Constitutionality of the proposition to make the findings conclusive.

Section 109. Objections to transferring the jurisdiction to the Circuit Courts.

- “ 110. A remedy proposed.
- “ 111. Objections to conferring upon the Commission power to enforce its own decrees.
- “ 112. Manner in which the Commission professes to deal with legal questions.

INDEX OF CASES CITED.

Bennett <i>vs.</i> Mattingley, 2 I. C. C. R., 806.	49
Bowman <i>vs.</i> Chicago & N. W. R. R., 125 U. S. 465.	56
Brown <i>vs.</i> Maryland, 12 Wh. 419	10, 72, 106
Budd <i>vs.</i> New York, 143 U. S.	45
California <i>vs.</i> Central Pacific R. R., 127 U. S. 1	38, 126
Carton <i>vs.</i> Ill. Central R. R., 22 A. L. Reg. 373	61
Chicago & N. W. R. R. <i>vs.</i> Dey, 35 F. R. 866 and 38 F. R. 656	50
Chicago, M. & St. P. R. R. <i>vs.</i> Minn., 134 U. S. 418	47, 144
Chicago & Alton R. R. <i>vs.</i> Ill., 13 A. & E. R. R. Cas. 42	90
City of Salem, The, 2 I. C. R. 418	20
Coe <i>vs.</i> Errol, 116 U. S. 517	7, 34, 66, 68, 125
Commonwealth <i>vs.</i> American Dredging Co., 122 Pa. St. 386	127
Commonwealth <i>vs.</i> D. & H. R. R., 21 W. N. C. 406	113, 121
Commonwealth <i>vs.</i> Lehigh Valley R. R., 22 W. N. C. 525	71
Commonwealth <i>vs.</i> N. Y. L. E. & W. R. R., 21 W. N. C. 411	94, 98
Cook <i>vs.</i> Pennsylvania, 97 U. S. 566	149
Cooley <i>vs.</i> Board of Wardens, 12 How. 299	94
Corfield <i>vs.</i> Coryell, 4 Wash. Cir. Ct. Rep. 378	3, 28
County of Mobile <i>vs.</i> Kimball, 102 U. S. 691	58
Crutcher <i>vs.</i> Commonwealth, 141 U. S. 47	115
Cutting <i>vs.</i> F. R. & N. Co., 46 F. R. 641	9
Daniel Ball, The, 10 Wall. 557	6, 19, 65
Escanaba <i>vs.</i> Chicago, 107 U. S. 628	95
Fargo <i>vs.</i> Michigan, 121 U. S. 230	111
Georgia R. R. & Banking Co. <i>vs.</i> Smith, 128 U. S. 174	49
Gibbons <i>vs.</i> Ogden, 9 Wh.	2, 10, 11, 12, 43, 55, 58, 63, 71, 72
Gilman <i>vs.</i> Philadelphia, 3 Wall. 713	21, 95, 103
Gloucester Ferry Co. <i>vs.</i> Penna., 114 U. S. 196	113
Hall <i>vs.</i> De Cuir, 95 U. S. 435	59, 79, 82, 86, 87, 92, 93, 112, 117, 124
Hays <i>vs.</i> S. S. Co., 17 How. 596	136
Henderson <i>vs.</i> Mayor, 92 U. S. 259	63

Interstate Commerce Commission <i>vs.</i> Lehigh Valley R. R., 3 I. C. R. 796	141
Jamison <i>vs.</i> Gas Co., 3 I. C. R. 613	84
Kentucky, etc., Bridge Co. <i>vs.</i> Louisville, etc., R. R., 37 F. R. 567	49, 141
Koehler, <i>ex parte</i> , 30 F. R. 867	9, 35
Kohl <i>vs.</i> U. S., 91 U. S. 367	39
Legal Tender Cases, 110 U. S. 421	30
Leisy <i>vs.</i> Hardin, 135 U. S. 100	56, 58, 64, 76, 139
LeLoup <i>vs.</i> Mobile, 127 U. S. 640	115
Lord <i>vs.</i> S. S. Co., 102 U. S. 541	20, 86
Louisville, etc., R. R. <i>vs.</i> Miss., 133 U. S. 537	92
Maine <i>vs.</i> Grand Trunk R. R. Co., 142 U. S. 217	115
Mattingly <i>vs.</i> Penna. Co., 2 I. C. R. 806	35
McCall <i>vs.</i> California, 136 U. S. 104	114
McCullough <i>vs.</i> Maryland, 4 Wh. 316	125
Marye <i>vs.</i> B. & O. R. R. Co., 127 U. S. 117	134
Minnesota <i>vs.</i> Barber, 136 U. S. 317	64, 76, 86, 103
Montello, The, 20 Wall. 430	20
Munn <i>vs.</i> Ill., 94 U. S. 113	44
Nashville, etc., R. R. <i>vs.</i> Alabama, 128 U. S. 96	78
New Orleans Cotton Ex. <i>vs.</i> R. R. Co., 2 I. C. R. 519	70
Norfolk & W. R. R. <i>vs.</i> Virginia, 3 I. C. R. 671	85
“ “ “ <i>vs.</i> Pennsylvania, 136 U. S. 114	114, 116
Passenger Cases, 7 How. 283	2, 18, 69
Pensacola & Atlantic R. R. <i>vs.</i> State, 37 A. & E. R. R. Cas. 579	52
Pensacola Tel. Co. <i>vs.</i> W. U. Tel. Co., 96 U. S. 1	4, 23, 38
People <i>vs.</i> Compagnie Generale, 107 U. S. 59	72
Philadelphia S. S. Co. <i>vs.</i> Pennsylvania, 122 U. S., 326	110, 112, 116, 119
Pickard <i>vs.</i> Pullman Car Co., 117 U. S. 34	133
Pullman Palace Car Co. <i>vs.</i> Hayward, 141 U. S., 36	130
“ “ “ “ <i>vs.</i> Pennsylvania, 141 U. S. 18	130, 135
“ “ “ “ <i>vs.</i> Twombly, 29 F. R. 658	129
Rahrer, in re, 140 U. S. 545	139
Railroad Commission Cases, 116 U. S. 317	96
Railroad <i>vs.</i> Husten, 95 U. S. 465	63, 76, 99
Railroad <i>vs.</i> Lockwood, 17 Wall. 357	79
Railroad <i>vs.</i> Peniston, 18 Wall. 5	125

INDEX TO CASES CITED.

xvii

<i>Ratterman vs. W. U. Tel. Co.</i> , 127 U. S. 411	113
<i>Robbins vs. Shelby Taxing Dist.</i> , 120 U. S. 489	114
<i>Sherlock vs. Alling</i> , 93 U. S. 99	76, 82
<i>Sinnot vs. Davenport</i> , 22 How. 227	72
<i>Smith vs. Alabama</i> , 124 U. S. 465	78, 87, 96, 101
<i>Stanley vs. Wabash, etc.</i> , R. R., 3 I. C. R. 176	89
<i>State Freight Tax Case</i> , 15 Wall. 232	2, 58, 69, 107, 108
<i>State vs. Chicago, etc.</i> , R. R., 2 I. C. R. 426	70
<i>State vs. Indiana, etc.</i> , Gas Co., 2 I. C. R. 758	84
<i>State Tax on Gross Receipts' Case</i> , 15 Wall. 284	109
<i>Sternberger vs. Cape Fear & Y. V. R. R.</i> , 2 I. C. R. 426	70
<i>Stockton vs. Balto. & N. Y. R. R.</i> , 32 F. R. 9	15, 41
<i>Stone vs. Farmers' L. & T. Co.</i> , 116 U. S. 307	50
<i>Telegraph Co. vs. Texas</i> , 105 U. S. 460	109
<i>Tennessee vs. Pullman Car Co.</i> , 117 U. S. 51	133
<i>Tennessee R. R. Commission Cases</i> , 19 F. R. 678	29, 45, 64, 84
<i>Transportation Co vs. Wheeling</i> , 99 U. S. 273	120, 121
<i>U. S. vs. Coombs</i> , 12 Pet. 72	3, 31
<i>U. S. vs. De Witt</i> , 9 Wall. 41	13
<i>U. S. vs. Fisher</i> , 2 Cranch. 358	31
<i>Wabash, etc, R. R. vs. Ill.</i> , 118 U. S. 557	59, 65, 89
<i>Weber vs. Va.</i> , 103 U. S. 344	
<i>Wellman vs. Chicago & G. I. R. R.</i> 45 A. & E. R. R. Cas. 249	54
<i>Welton vs. Missouri</i> , 91 U. S. 275	58, 99
<i>Western U. T. Co. vs. Alabama</i> , 132 U. S. 472	113
" " " <i>vs. Mass.</i> , 125 U. S. 530	120
" " " <i>vs. Mayor</i> , 2 I. C. R. 533	96
" " " <i>vs. Pendleton</i> , 122 U. S. 347	35, 89
<i>Wheaton vs. Peters</i> , 8 Pet. 591	79
<i>White's Bank vs. Smith</i> , 7 Wall. 646	3
<i>Wigton vs. Penna. R. R.</i> , 25 W. N. C. 574	64
<i>Willamette Bridge Co. vs. Hatch</i> , 125 U. S. 1	103
<i>Wilson vs. Black Bird Creek Co.</i> , 2 Pet. 250	95, 103

INTRODUCTION.


ERRATA.

- Page 5. The word "all" should be eliminated from line 16.
Page 38. Insert "by steam" after "locomotion," in line 4.
Page 91. Substitute "their" for "its," in line 15.

ttled the construction of this clause for all time. And even those cases whose authority still remains unimpaired do not often shed much light upon the subject, for the questions which now arise under this head are usually quite different from any that have previously been before the Court. This wonderful fertility in novel and intricate questions has rendered the construction of the Commerce Clause extremely difficult, so that even after a century of interpretation and discussion this portion of the Constitution still remains more or less shrouded in mystery.

We ought not, indeed, to be surprised at this when we consider the unique character of the clause, both in phraseology and subject matter. Not only are the terms used extremely general and indefinite, and capable of a very latitudinous construction, but the subject matter also is one of great breadth and compass. What is the nature and extent of a power to regulate a commerce must necessarily depend upon the nature of that commerce and the means by which it is carried on. Now more frequent and fundamental changes have taken place in the methods and conditions of interstate commerce than in any other field of human activity. This has been especially the case during the century now drawing to a close, and has been principally due to two causes: The development of the country, and the invention of the steam engine. When the population of the country was confined to a few sparsely-settled regions along the Atlantic coast, commerce between the States was almost unknown, and what little there was of it was carried on exclusively by water, and differed in no essential respect from commerce with foreign Nations. When, however, the population had spread over the whole continent, intercourse and trade between the different parts of the country became of great importance, and with the introduction of railways, interstate commerce rapidly assumed its present gigantic proportions.

In the meantime it was only with great difficulty that the Court was able to keep pace with this wonderful development. Interstate commerce had been revolutionized;



consequently, judicial doctrines in regard thereto had to be reconstructed. No wonder, then, that it was sometimes found necessary to abandon some of the ground taken in previous cases, to deny the application of principles which subsequent events had shown to be unsatisfactory, and to recur, as Mr. Justice Bradley says, "to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the Court in former times, and to modify in some degree certain dicta and decisions that have been made in the intervening period. This is always done, however, with great caution, and with an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts."

But this shifting of judicial opinion in the construction of the Commerce Clause, though seen to be inevitable by eminent jurists from the very first, has left the popular mind in ignorance as to the real meaning of that portion of the Constitution. As evidence of how great this ignorance really is, even among men of learning and ability, we need only mention the "Original Package Case," than which no deliverance of the Supreme Court since the Dred Scott decision created more widespread astonishment and alarm, but which, when we study it carefully, is only found to be the last step in the direction in which the decisions have been tending for several years, and which could not have occasioned any surprise had those decisions been generally known and appreciated.

That case, affecting in a greater degree than any other, the vital and domestic interests of the country, has to some extent disclosed to the generation of this day the magnitude of the power which our forefathers conferred upon Congress by the Commerce Clause. Indeed, since the great questions arising out of the Civil War Amendments have been finally disposed of, the construction of this clause has become the most important occupation of the Supreme Court, and, if we read the signs of the times aright, it is likely to continue so for many years. There is undoubtedly a growing demand for more legislation on the subject of railroads, and recently the tide of public opinion has turned in favor of Congressional action in this respect, as witness the Interstate Commerce Act. But if Congress is to regulate the railroads of the country, it can only be by virtue of some clause or clauses of the Constitution conferring upon it a power so far-reaching. Now for all practical purposes, whatever power of this nature Congress does possess must be derived from the Commerce Clause. A question which at once arises, and upon which the Court will finally have to pass is What is the nature and extent of that power? Part I of this work will be devoted to the investigation of this subject.

Nor is this the only way in which the Commerce Clause affects the railroads of the country. Very certainly the provision that Congress shall have power to regulate interstate commerce implies that Congress should regulate such commerce, and the States shall not; conse-

quently, since the furtherance of interstate commerce is the chief business of railroads, and the object for which they are built, all laws regulating railroads must be more or less regulations of such commerce, and as that is beyond the power of the States, the latter are without doubt deprived of a large portion of the legislative power over railroads which they would otherwise possess. To what extent they are so deprived, and how far their legislative powers over railroads are not affected by the Commerce Clause, are questions which will be investigated in Part II, while Part III will be devoted to an examination of the State power to tax railroad companies.

THE RAILROADS AND THE COMMERCE CLAUSE.

PART I.

OF THE POWER OF CONGRESS, UNDER THE COMMERCE CLAUSE, TO REGULATE RAILROADS.

CHAPTER I.

THE GENERAL NATURE OF THE POWER OF CONGRESS OVER COMMERCE.

1. THE extent and nature of the power of Congress under the Commerce Clause has seldom come directly in question, because there has been so little Congressional legislation under this head, but the subject has frequently called for consideration in cases involving the question as to how far that power is a restriction upon State legislation.

Considering the words of the grant: "Congress shall have power to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes,"¹ the first point to be noticed is that the thing which Congress is given power to regulate is *commerce*. By that word is meant, "the commercial intercourse be-

¹ Const., Art. I, Sec. VIII, 4.

2 THE RAILROADS AND THE COMMERCE CLAUSE.

tween Nations and parts of Nations in all its branches.”¹ This includes navigation by water,² and transportation by land,³ of passengers as well as freight.⁴

2. Secondly, it will be observed that the commerce which Congress is given power to regulate is defined, not by the locality in which it is found, but by the character which it bears. “The power,” says Chief Justice Marshall, “is co-extensive with the subject, and may be exercised whenever it exists.”

3. Thirdly, that over the particular subject confided to its care, “this power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than those prescribed in the Constitution. The sovereignty of Congress, though limited to specified objects, is plenary as to those objects, and the power over commerce with foreign Nations and among the several States is vested in Congress, as absolutely as in a single government, having in its Constitution the same restrictions on the exercise of the power, as are found in the Constitution of the United States.”⁵

4. Nor is the power of Congress confined to enacting such laws as are regulations of commerce *per se*. Congress, under its general authority, to make all laws necessary and proper to carry out its delegated powers, may

¹ *Gibbons vs. Ogden*, 9 Wh. 1 (1824).

² *Gibbons vs. Ogden*, *supra*.

³ *State Freight Tax Case*, 15 Wall. 232 (1873).

⁴ *Passenger Cases*, 7 How. 283 (1849).

⁵ *Gibbons vs. Ogden*, *supra*.

enact laws which are only incidental to the regulation of commerce with foreign Nations and among the several States. As, for example, Congress may provide for the punishment of persons who steal goods from vessels in distress,¹ and may establish a uniform recording system for documents relating to vessels engaged in the coasting trade.²

5. Congress having been given the power to regulate commerce itself, that power necessarily comprehends the control, for that purpose, of all the instrumentalities of commerce. "Commerce with foreign Nations, and among the several States, can mean nothing more than intercourse with those Nations and among those States, for the purposes of trade, be the object of the trade what it may ; and this intercourse must include all means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage over and through the States, where such passage becomes necessary to the commercial intercourse between the States."³ Nor are the powers of Congress confined to the instrumentalities of commerce known, or in use, when the Constitution was adopted. "They keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse and its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the

¹ *U. S. vs. Coombs*, 12 Pet. 72 (1838).

² *White's Bank vs. Smith*, 7 Wall. 646 (1868).

³ *Corfield vs. Coryell*, 4 Wash. Cir. Ct. R. 378.

4 THE RAILROADS AND THE COMMERCE CLAUSE.

steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times, and under all circumstances.”¹

¹ *Pensacola Tel. Co. v. W. U. T. Co.*, 96 U. S. 9 (1878).

CHAPTER II.

OF THE COMMERCE CARRIED ON BY RAILROADS, WHICH
CONGRESS MAY REGULATE.

6. REGULATIONS of commerce naturally divide themselves into two classes: direct regulations of commerce, and laws governing the instrumentalities by which commerce is carried on. To the first class belong all those laws which govern the commercial relations of those engaged in commerce to those who employ them, and the community in general; as, for example, in the case of common carriers, the rates which they shall charge, and the manner in which they shall make them public; the articles which they shall carry, and the manner in which they shall carry them, etc.; while, to the second class, belong all laws dealing with the instrumentalities used in carrying on commerce, in their general relations to the community at large, as, for example, automatic brake and coupler laws, and all those laws which are generally spoken of as "Police Regulations." When Congress attempts to pass laws of the first kind, of which the Interstate Commerce Act is a good example, it can only do so when the commerce which it seeks to regulate is within its jurisdiction. It becomes necessary, therefore, to determine what commerce Congress has power to regulate, or (since in respect to railroads commerce and transportation

are synonymous terms, because it is only as transporters that railroads are concerned in commerce), what transportation is under the regulating power of Congress.

7. The kinds of transportation which Congress may regulate, are, first, by the very words of the grant, transportation between a point within a State and a point without it; secondly, transportation between two points in the same State, but through other States or foreign countries; thirdly, transportation between two points in the same State, but forming part of a through transportation to or from another State; in other words, where the contract, under which the local transportation is made, is but part of a contract for interstate or foreign carriage. That a contract so made and so carried out is interstate commerce, cannot be doubted, and the fact that the *transportation* is not interstate is immaterial, for Congress was given power to regulate interstate commerce, and under that power may regulate any transportation which is connected with such commerce irrespective of the situation or character of the transportation. This was virtually decided in the case of "The Daniel Ball."¹ The question in that case was whether a boat navigating between two points within the limits of a single State, upon a river also entirely within those limits, was under the power of Congress because she carried goods destined and marked for points in other States. This depended upon whether she was engaged in interstate commerce, which depended upon the determination of the question, whether

¹ 10 Wall. 557 (1870).

such a transportation was interstate commerce. Said Mr. Justice Field: "So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan, and destined to points within that State, she was engaged in commerce among the States. Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that article between the States has commenced. The fact that several different and independent agencies are employed, in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction."

8. Just when an article has commenced to move as an article of trade from one State to another, is not always easy to determine. It has so begun to move, the Court said, in *Coe vs. Errol*,¹ when it has started on its final journey out of the State. It has so started, it seems, when the owner has delivered it to a common carrier for that purpose, and has put it in such a situation that its future transportation out of the State is not dependent upon his intention. All that is needed is some test, other than the mind of the shipper, to show whether the goods have really begun to move as articles of trade between the States. The bill of lading under which they are shipped is generally made use of for this purpose, but this is unsatisfactory, because it does not cover all the cases. While a through bill is a sure sign that the articles have

¹ 116 U. S. 517 (1886).

started on their final journey out of the State, it by no means follows that all commodities that have so started will be provided with such bills. Thus, shippers of grain at Chicago will often bill by the lake boats only to Buffalo, hoping to obtain better rates from there East, when the cargo arrives. The railroad which carries the grain from Buffalo to New York, is then said to be engaged in local transportation only, and does not come under the Interstate Commerce Act, unless the boat is owned by the railroad company or operated in connection with it.

Now there is nothing reasonable in this. The transportation of grain from Buffalo to New York is no more local, under most circumstances, than would be the transportation of iron ore from Philadelphia to the iron furnaces of Pennsylvania. In both cases the transportation, though between points in the same State, is practically interstate commerce, because, as a matter of common knowledge, the commodities in both cases must have come from points without the State. Congress has, indeed, disregarded the bill of lading as a test in one case, namely, where carriers attempt to make transportation local which would otherwise be continuous and interstate. In such a case the Court must look behind the bill of lading to the real character of the transportation. If this be found, by reason of its origin and destination, ascertained in the best way possible, to be interstate, then the transportation, though in form merely local, is, in reality, interstate, and subject to Congressional control.¹

¹ The United States Circuit Court for the Northern District of Florida has

9. The Interstate Commerce Act contains the proviso: "That the provisions of this Act shall not apply to the transportation of passengers or property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid." Commenting on the results of this exception, the Interstate Commerce Commission in their Third Annual Report, page 386, et seq., say: "It is doubtful if there is a single railroad in the country that does not to some extent participate in interstate traffic, and which, if left to be a law to itself, or subject to acts which differ from the Act to regulate commerce, may not be a disturbing element in the enforcement of that Act. There is no such thing as a complete and harmonious regulation of interstate commerce by rail when part of the carriers by rail are governed by one set of laws and the other parts are left to laws which are materially different. Still less can there be complete and harmonious regulation whenever upon interstate roads there is regulation of a part of the traffic by one set of laws and another part by another and materially different. An interstate road takes little or no notice of State laws in the management of its business. State traffic and interstate traffic are taken upon the same trains, under the same management," etc.

Indeed, if the Interstate Commerce Act is a complete
 ✓ (here) held that the shipment of freight, by local bill of lading, to a forwarding agent in the same State, to be reshipped by him without unloading, breaking bulk, or delay, to ultimate consignees in another State, is interstate commerce, the rates for which cannot be prescribed by the State railroad commission. Cutting vs. F. R. & N. Co., 46 Fed. Rep. 641. See also Ex parte Koehler, 30 F. R. 867.

expression of the whole extent of the power of Congress, its practical operation would demonstrate that that power falls far short of the mischief which it was intended to remedy. But *is* it a complete expression of that power, in other words, is not the exception in the proviso broader than, from a constitutional point of view, was necessary?

10. It is frequently said that the purely internal commerce of a State is exempt from Congressional control. But the ground upon which the exception rests is that powers not delegated are reserved to the States. What, then, was delegated? "The power," says Chief Justice Marshall, "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations."¹ And in another place: "It may be doubted whether any of the evils, proceeding from the feebleness of the Federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress. It is not, therefore, a matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."² And another quotation from the same great jurist and statesman, to whose utterances we always

¹ *Gibbons vs. Ogden*, *supra*.

² *Brown vs. Maryland*, 12 Wh. 419 (1827).

look with so much profit for enlightenment on this and other subjects: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, therefore, may be considered as reserved for the State itself."¹

These quotations make it plain that what was granted was the power to regulate all commerce in whose regulation the people of the whole country have a common interest, and if the internal commerce of a State is exempt from Congressional control, it is because it is not necessary to interfere with it in order to carry out the general power to regulate commerce among the States and with foreign Nations, and that it is not exempt simply because it is internal. The power of Congress does not depend upon the situation of the commerce, but upon its character; not upon the fact that the particular transaction to be regulated is between persons in different States, or involves the transportation of persons or goods out of the State, but upon the intimate relation of that transaction to the general commerce of the country. Whenever the commercial interests of the States require that such a transaction shall be subject to their common control we

¹ *Gibbons vs. Ogden*, 9 Wh. 1-195 (1824).

are justified in concluding that the framers of the Constitution intended that Congress should have full power to regulate it for that purpose and to the extent which those interests require. "Commerce among the States," says Chief Justice Marshall, "means commerce which concerns more States than one;"¹ in other words, any commerce in which more States than one have an interest.

It is, of course, seldom that there is any interest outside of the State in commerce carried on entirely within that State. But whenever the regulation of such commerce is necessary in order to completely, harmoniously and satisfactorily regulate commerce among the several States, then it is a commerce in which the other States have an interest, and Congress may therefore regulate it as far as may be necessary in order to properly execute the power granted. And so long as the law of Congress purports to interfere with the internal affairs of the State only in so far as may be necessary to carry out the general powers of the government it would be valid, for it can hardly be, that in a subject of this kind, the Court would undertake to declare unnecessary an interference which Congress had considered essential. Should Congress, however, attempt to regulate the internal commerce of a State as an object in itself, and not for the purpose of executing the power delegated, the law would undoubtedly be void because no direct power over that subject

¹ *Gibbons vs. Ogden*, *supra*.

was ever confided to Congress, but only an indirect and incidental authority.¹

11. That some such interference with the internal commerce of States is absolutely essential if the Interstate Commerce Act, or any other similar measure is to be made effective, is perhaps sufficiently plain from the remarks quoted from the report of the Commission. Perhaps, however, a few additional illustrations may be useful. There is an immense transportation carried on between the ports of Buffalo and New York. This is carried by several roads, all but one of them being interstate, that is, running for some part of the distance between Buffalo and New York in States other than New York. All but one are, therefore, under the Interstate Commerce Act, and compelled to publish the rates for such transportation, and are prevented from altering them without the usual notice. Now the New York Central, being entirely within the State of New York, is, when transporting from Buffalo to New York, engaged in transportation wholly within a State, and is therefore not subject to the Act, and may alter its rates at will, and without notice, or may carry on any other of the evil practices which the Act was intended to prevent.

12. The results of this situation upon the practical enforcement of the Act may be seen at a glance. Should it be found that the rates had been made too high, or

¹ U. S. *vs.* De Witt, 9 Wall. 41 (1869), where it was decided that Congress has no power under the Constitution to prohibit the sale of articles within the State, as for example, petroleum under a certain fire test.

should it happen that at any time the capacity of the carriers was in excess of the demand for their services, in other words, the number of cars on hand was greater than was needed for the movement of all the grain in port; then, assuming that the Act was rigidly enforced, the Central would have a most unfair advantage over all other lines. They would be compelled to maintain their published rates, although under the circumstances they must know that they will certainly lose the business. The Central, however, can make reductions or give rebates to suit the condition of the trade. Should a vessel arrive in port with a perishable cargo, when the Central was the only road that had any spare cars, the rates which it might charge might be most exorbitant, and yet the shipper would have no redress. *Isn't this contra to the Null case of 1887?*

But all this is on the assumption that under such circumstances the Act is strictly adhered to by the carriers subject to it. Such an assumption is a pleasant farce. Sooner or later one of the carriers yields to the temptation, and makes a secret rate or gives a rebate, in order to obtain a business that is drifting away from it. Then, of course, the same thing more or less is done by the others, and thus the Act is made a nullity.

13. And who, indeed, would desire its strict enforcement under such circumstances? What principle, political, economical or ethical demands that a railroad which crosses State boundaries shall not carry on practices injurious to shippers, while another road engaged in exactly the same business, but not crossing State lines, may?

What, in other words, have State lines to do with commerce, and how can any rational or satisfactory system of commercial regulations be constructed upon such a basis? The ingenious and minute division of the powers of government between the National and State authorities, of which the framers of the Constitution are currently credited with being the originators, may be very useful and appropriate for some purposes, but as far as the regulation of commerce is concerned, it is almost an unmitigated evil. Local regulations of commerce operating injuriously upon the people of other localities was an evil with which those eminent patriots were thoroughly familiar, and to remedy which they inserted the Commerce Clause, and could they now be present and see how State legislation, or the lack of it, on purely internal commerce, is operating injuriously upon the commercial interests of the country, they would be the first to assert the paramount power of Congress over all species of commerce, and to agree with Mr. Justice Bradley, when he says, "In matters of foreign and interstate commerce there are no States."¹

14. But it has been suggested that the evils resulting from the present condition of affairs could be largely remedied by the substantial enactment of the Interstate Commerce Act by all the States and Territories. No doubt, if this *were* done, many of the difficulties would be removed. But if this is the only way out of the difficulty we must conclude that when the Constitution vested in

¹ *Stockton vs. Balto. & N. Y. R. R.*, 32 F. R. 17 (1887).

Congress the power to regulate foreign and interstate commerce, it made the complete and adequate exercise of that power dependent upon the will of forty-four different States, as expressed in concurrent and harmonious statutes, modified from time to time in accordance with the desire of Congress. To so construe any prerogative of the Federal government would be to reduce it to the feebleness of the Confederation, which is described by Chief Justice Marshall as "a council of ambassadors, a mere agency, hardly worthy of the name of government," and whose decrees any State was at liberty to disregard. "It was just this feebleness," said the same jurist, to whose liberal and statesman-like decisions the practical success of the Constitution is so largely due, "which brought about that great revolution which introduced the present system," and the fundamental distinction between the Articles of Confederation and the Constitution under which we live, is found in the clause declaring that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." With this provision standing in the Constitution, how can it be said that the power of Congress is not as extensive as the mischief? Having once demonstrated that the complete, harmonious and satisfactory regulation of interstate and foreign commerce requires legislation upon matters usually considered exclusively under State control, the power of

Congress to enact such laws is established; for matters whose regulation is necessary to execute the powers vested in Congress, are not exclusively under State control.

We conclude, therefore, that whenever the interests of the States as a whole require it, Congress may regulate all species of transportation and commerce, without regard to its geographical situation. And it follows from this that the Interstate Commerce Act is, as regards the commerce which it purports to regulate, and the railroads which it assumes to control, not only entirely within the scope of the Congressional power, but is, in fact, an incomplete enumeration of the kinds of transportation which Congress has power to regulate. Indeed, much of the inequality and injustice which attend the application of the Act arise from the fact that Congress has not exerted its full power over the subject. ✓

CHAPTER III.

THE POWER OF CONGRESS TO REGULATE THE OPERATION
OF RAILROADS.

15. MR. JUSTICE WAYNE, in his interesting discussion of the Commerce Clause in the Passenger Cases,¹ uses the following language: "What commerce was in fact, at least so far as European Nations were concerned, had been settled beyond all dispute before our separation from the mother country. It was well known to the framers of the Constitution, in all its extent and variety. Hard denials of many of its privileges had taught them what it was. They were familiar with many valuable works upon trade and international law which were written and published, and which had been circulated in England and in the colonies from the early part of the last century up to the beginning of the Revolution. It is not too much to say, that our controversies with the mother country upon the subject had given to the statesmen in America in that day more accurate knowledge of all that concerned trade in all its branches and rights, and a more prompt use of it for any occasion, than is now known or could be used by the statesmen and jurists of our own time. Their knowledge may well be invoked to measure the constitutional power of Congress to regulate commerce."

¹ 7 How. 283.

16. The phrase, "Regulate Commerce," was a familiar one at the time of the adoption of the Constitution, it having been used in no less than twenty-seven Acts of Parliament passed before that time. Those laws consisted mostly of port and harbor regulations, navigation laws, etc., and had relation more to the vessels and other instruments employed in commerce than to the commerce itself. It was just such laws that the framers of the Constitution intended that Congress should have power to enact, and it has always been conceded that the vehicles and agencies of water transportation are exclusively under the control of Congress whenever it chooses to legislate upon the subject. The Court says, in one case, "By the Constitution the whole commercial marine of the country was placed under the control of Congress."

17. The authority of Congress to regulate the instrumentalities of commerce being based upon its power to regulate interstate and foreign commerce, must be exercised with reference to that commerce. If, for example, Congress has power to regulate vessels, it must be because such a power is necessary to the satisfactory regulation of interstate or foreign commerce. When the vessel is actually engaged in such commerce there can be no doubt of the power of Congress, nor does it affect the question that the vessel only runs between points within a single State upon a river entirely within the limits of that State.¹ Moreover, the power of Congress is not confined to vessels which are actually engaged in interstate or foreign

¹ The *Daniel Ball*, 10 Wall. 557 (1870).

commerce. It would be a very useless power if it were. For it is perfectly apparent that all those laws which govern the relation of vessels to each other, the lights they shall burn, the signals they shall use, and their conduct when approaching or passing each other, etc., can only be effective and useful when they apply to all kinds of vessels equally and alike. For example, it would be worse than useless to require a vessel engaged in interstate commerce to conform to certain regulations in regard to signals and lights, if other vessels in the same waters were at liberty to disregard such regulations, or were bound to obey others materially different. It has, therefore, generally been understood and conceded that the exclusive authority to make such laws is vested in Congress, and that they are applicable, not to vessels engaged in foreign and interstate commerce only, but also to those vessels which, though engaged in purely internal commerce, are likely to come in contact with vessels from other States or countries.

18. It was held in *Lord vs. Steamship Co.*,¹ that a vessel navigating the high seas between the ports of a single State was under the regulating power of Congress, because in prosecuting such voyages she necessarily came in contact with vessels engaged in interstate and foreign commerce. And in the case of "*The Montello*,"² the Court held that vessels navigating the Fox River, a stream en-

¹ 102 U. S. 541 (1880).

² 20 Wall. 430 (1874). See also similar decision of U. S. District Court of Oregon, in case of "*The City of Salem*," Q. I. C. R. 418 (1889).

tirely within the limits of Wisconsin, were under the power of Congress because interstate commerce was actually carried on over that river. The latter case is particularly interesting, from the fact that the Fox River was not naturally navigable for the class of boats involved in that case, but had been made so by means of canals. The Court, it is true, decided that it had always been navigable for certain kinds of vessels, and that interstate commerce had actually been carried on over it in its natural state. But after the channel had been improved the vessels ran, for a part of the time, in artificial channels. It can hardly be supposed that vessels which, while navigating the original bed of the stream, were subject to the laws of Congress, would become exempt from compliance with such laws while in the artificial channel. The reasoning seems to show that when interstate commerce is carried on over a highway, the highway and the vehicles upon it are subject to the regulating power of Congress, whether the highway be artificial or natural.

19. It was said in *Gilman vs. Philadelphia*,¹ "Wherever commerce among the States goes, the power of the Nation, as represented in this Court, goes with it to protect and enforce its rights." Nor is there any clear distinction between natural and artificial highways in this respect. Rivers, especially those entirely within a State, were no more dedicated to Congressional control than were the canals or other artificial highways of the States.

¹ 3 Wall. 713 (1866).

The power of Congress over both rivers and canals must be found, if found at all, in the clause conferring upon Congress the power to regulate commerce with foreign Nations and among the several States, and extends equally to each in so far as they furnish the means by which such commerce is carried on. Rivers, especially those situated in more than one State, have always been considered pre-eminently appropriate subjects of National legislation, because the inappropriateness of independent State legislation on the subject was at once apparent—was, in fact, the very evil which the grant of power to Congress was intended to prevent. But the distinction is largely chronological, and although Congress has hitherto mostly confined itself to the regulation of natural highways, the time is rapidly approaching when artificial highways will demand its principal attention. We have only to glance at the clause in the Constitution to see that no argument can be drawn from the words used to show that it was the intention of the framers of that instrument to confine the power of Congress to any of the particular means by which commerce may be carried on. The clause reads: "Congress shall have power to regulate commerce with foreign Nations, among the several States, and with the Indian tribes."¹ It is commerce itself which is confided to the care of Congress, and whenever and wherever the commerce exists, Congress may regulate it and the instruments by which it is carried on. The instruments must be regulated with reference to the commerce they are em-

¹ Const., Art. I. Sec. 8, 4.

ployed in, but as they are only regulated because of and through the power to regulate that commerce, it is entirely immaterial whether they were known and in use at the time the Constitution was adopted.¹

20. We have confined our attention thus far to water transportation because it is that branch of the general subject of the power to regulate commerce which has received more attention than any other, and in regard to which the doctrines are better settled. The power of Congress over commerce by land may be inferred by analogy from what has already been decided as to its power over commerce by water. We have seen that the power of Congress over vessels is practically unlimited, and that this arises from the fact that vessels are the instruments of interstate and foreign commerce, or come into such intimate relations with vessels which are so employed that their regulation by one authority is necessary for the welfare of the whole. We have now to inquire whether there is any essential distinction between the instruments of water and land transportation, in this respect. As far as the actual vehicles of transportation are concerned, there does not seem to be any difference. Take, for example, a law prescribing how railroad cars shall be built and used, and one of the same character applying to vessels. What Congress may require in one case it may require to the same or a greater degree in the other. If axes and water-buckets must be provided in passenger ships, they may also be required in passenger cars. If

¹ *Pensacola Tel. Co. vs. W. U. Tel. Co.*, 96 U. S. 1 (1888). See Sec. 5.


the boilers of steamships must stand certain tests, locomotive engines may be subject to a similar examination, and the same may be said of every possible regulation of the instrumentalities of commerce. And, as in the case of vessels, the power of Congress in regard to railroad cars is not affected by the fact that the cars are only run between points in the same State. In the case of "*The Daniel Ball*," before referred to, in reply to a suggestion that if the vessel in question was under the power of Congress, railways entirely within a State, but transporting goods to points without the State, would also be under that power, the Court says, "We are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State." And we have also endeavored to show that vessels employed in interstate or foreign commerce are subject to the regulations of Congress even when navigating in a purely artificial channel. The power of Congress attaches to the vessel on account of the business in which it is engaged, and not by reason of the locality in which it is found. The power over the vessel does not arise from the control of the water it navigates, but rather a control of the water from a power over the vessel. Therefore, the power over the vessel follows it wherever it goes in pursuit of interstate or foreign commerce, whether in navigating the high seas, the public rivers, or the private canals. A railroad car is not ex-

empt from Congressional regulation because it is used as an artificial highway, any more than a vessel is, nor is it, any more than a vessel, exempt from such control on account of its being private property.

21. Congress, in pursuance of its power to regulate interstate and foreign commerce, has not confined itself to the regulation of vessels actually employed in such commerce, but has extended its control over those vessels also with which vessels of the former class come in contact, or whose regulation is necessary in order to carry out the regulation of those vessels. The considerations which were urged in support of this power apply with even greater force to the regulation of railroad cars and trains. The relation of trains on the same road are fully as intimate as those of vessels on the same stream, and those of the cars of a single train are far more so. And, as a matter of fact, there are very few roads, especially in the East, which run their trains, like vessels, in one complete and unbroken body through the States. Along with, and forming part of the same train with cars coming from other States, are generally found cars which have been taken up, and will be dropped off within the State. For example, a railroad company may send a train solid from Chicago to Buffalo. On arriving there the train may be split up, part going by one road and part by another, each road adding enough of its own cars to make up a full train within the State. Therefore, if Congress can only regulate those cars which carry interstate goods or run interstate, its power can scarcely ever be

extended over more than part of a train at once. If this is a true construction of the power of Congress to regulate commerce, that power is weakest where it is most necessary that it should be strong, for the legislation which will soon be required is of a kind which is only useful when applicable to every part of a train. Laws compelling the adoption of uniform automatic couplers, it is claimed, would greatly reduce the number of accidents to trains and trainmen, but it is conceded, that unless every car in the train is so equipped, the advantage is greatly diminished, and in some respects, the danger is increased. The same advantages are said to follow the use of air-brakes, but it is apparent that a car without air-brake apparatus must prevent the use of the air-brakes on all the cars behind it, and attempts to use air-brakes on the front portion only of freight trains have led to serious accidents. Car stoves are considered dangerous because apt to set wrecks on fire, and therefore the presence of a single stove must endanger a whole train. Moreover, if the cars not so heated depend upon steam from the engine, those back of the car with the stove must be left without heat.

Therefore, in all these cases, which constitute the main objects of proposed Congressional legislation, the regulation must, to be of any use whatever, apply to every car which may at any time be used in connection with cars employed in interstate commerce. It has been suggested that Congress might accomplish the object desired by enacting laws in regard to cars actually engaged in inter-



state commerce, and request the several States to enact similar laws in regard to cars which never left their limits, or might wait patiently until the States concluded to take this course. But in another connection we have endeavored to show that if a subject of commerce can only be satisfactorily regulated by uniform laws, then the regulation of that subject is one in which all the States have a common, commercial interest, and is a fit subject for Congress to legislate upon, under its power to regulate interstate commerce, which has been defined by Chief Justice Marshall as "commerce which concerns more States than one."

22. It may happen that there are trains upon a road which does interstate business, which do not contain any cars destined for points outside the State, or any persons or property of that description. Are such trains, and the cars comprising them, subject to Congressional legislation? Vessels navigating the same waters with those engaged in interstate commerce have been universally acknowledged to be subject to the regulations of Congress as far as their relations to other vessels are concerned. The relations of trains upon the same railroad are far more intimate than those of vessels upon the same waters, and there is no such thing as a train entirely independent of all other trains upon the same road. Moreover, a road doing only a local business may cross, at grade, a road doing interstate business, in which case all trains upon the two roads are more or less intimately connected. A vessel may blow up, sink or meet with other accidents

without necessarily affecting other vessels, or obstructing the navigation of the stream, but almost every accident on a railroad either involves some other train in the same catastrophe, or blocks and delays travel over the whole road, or, indeed, where the accident occurs at a crossing, over two roads. Therefore, if Congress desires and has power to compel the adoption and use, on interstate trains, of appliances designed to prevent accidents, it has power to render that protection complete, by requiring that all other trains upon the same, or connecting roads, shall be equipped with the same devices. Congress may prohibit entirely the use of a car stove in any car used upon a road engaged in interstate business, because cars employed in such business as well as those used only for local transportation may be set fire to and destroyed, should a collision take place between two such trains.

23. So far, the inquiry has been confined to an investigation of what Congress may do in regard to the vehicles of commerce, or, in railroad terms, with respect to the rolling-stock. Now the road-bed of a railroad bears much the same relation to the rolling-stock as vessels do to the streams which they navigate. The power of the Federal government to regulate the navigable waters of the country has always been acknowledged. This power is based upon the fact that such waters are used by vessels engaged in interstate commerce, are, in fact, the means by which such commerce is carried on, and, as says Judge Washington, in *Corfield vs. Coryell*,¹ "Com-

¹ 4 Wash. C. C. 378.

merce with foreign Nations and among the several States, can mean nothing more than intercourse with those Nations and among those States for the purposes of trade, be the object of the trade what it may, and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage over land through the States, where such a passage becomes necessary to the commercial intercourse between the States." The power to regulate commerce must necessarily include the power to prescribe in what manner, and by what means that commerce shall be conducted, for example, in regard to railroads, what kind of cars shall be used, how they shall be run, what kind of a road-bed shall be used in their transportation, and what signals shall govern their movements, etc. In fact, as Judge Hammond says, in his very interesting discussion in the Tennessee Commission Case:¹ "The power of Congress to regulate an *instrumentality of commerce* is practically unlimited, because it may reach the commerce itself as well as its agencies; wherefore, there is no need to look to the character of the regulation in determining the power, but only to the character of the commerce."

Indeed, it is impossible to draw a line between what Congress may, or may not do in this respect. Any regulation concerning the construction, operation or management of a railroad company subject to Congressional control, which the welfare of interstate or foreign com-

¹ 19 F. R. 678.

merce demands, and which is more appropriate for Congressional than State action, is undoubtedly within the power of Congress. Whether the regulation is really thus necessary and appropriate, is a question almost entirely for the legislative body, and into the discussion of which the Courts would have great delicacy in entering. "Congress shall have power," says the Constitution, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."¹ And the Court, in the *Legal Tender Cases*² says: "By the settled construction and only reasonable interpretation of this clause, the words "necessary and proper," are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it." Whatever regulations, therefore, Congress may consider necessary and proper to accomplish the welfare of foreign and interstate commerce, are within its power, and the fact that the same result might have been reached by the use of other means is immaterial, for "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a

¹ Const., Art. I., Sec. 8, 19.

² 110 U. S. 421 (1884).

power granted by the Constitution.”¹ What means Congress may, from time to time, choose, cannot be foreseen, for things which would now seem to have only a remote and contingent bearing upon interstate commerce, may, in the rapid developments of time and circumstances, soon be seen to be most vitally and intimately connected therewith. It is quite possible that legislation, which, at the present time, would be condemned as a foolish and unnecessary interference with private affairs, will, a few years hence, be demanded as wise and conservative.

24. Of course the power of Congress is not confined to civil legislation. In the early case of the *United States vs. Coombs*,² it was decided that Congress could pass an Act punishing those who stole goods washed ashore from vessels in distress, although the offence was committed beyond the admiralty jurisdiction and within that of the State. This was on the ground that such offences were burdens and impediments upon commerce, which it was not only the right, but the duty of Congress to remove, by prohibiting the offence and punishing the offender. Therefore any Acts which amount to a burden and obstruction to a railroad engaged in interstate commerce may be prohibited by Congress. For example, men who attempt, by telegraphing “Webster’s Dictionary,” or some such signal, to paralyze a whole system, and make it useless for the purpose of interstate commerce, or anything

¹ *U. S. vs. Fisher*, 2 Cr. 358 (1804).

² 12 Pet. 72 (1833).

else, or endeavor to attain the same result by placing obstructions on the tracks which imperil the lives of the passengers, may, along with all others who in any way attempt to injure railroad property, be dealt with by the Federal authorities, according to their deserts.

25. In regard to the question as to what railroads are under the regulating power of Congress, perhaps no better definition can be given than that which is found in the proviso to the Interstate Commerce Act: "Any common carrier engaged in the transportation of passengers or property for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States." As explanatory of this a quotation from a speech by Judge Cooley may be useful: "What is spoken of as the railroad system of the United States is an illustration of unity in diversity such as it would be difficult to find elsewhere in the world. Every railroad corporation is in a legal sense independent of all others, and when its line is wholly within the limits of a single State, and it is operated independently, the laws make no provision for any other than local regulation. But there is scarcely a line of road in the country so short or so insignificant that the method in which its operations shall be conducted is not of something more than local

importance, or the character of its regulation of some concern to business interests beyond the State limits. It may be a link in a long line, extending through two or more States; it may be the principal, or, perhaps, the sole means for the transportation for the product of a mine or other important industry, which supplies many States; but whether of greater or less importance, it has relations to other roads which are not and cannot be wholly limited within any political division of the country, however extensive it may be. Even the little Catskill Mountain Railroad, by the issue of coupon tickets to San Francisco, may in a sense become a part of a transcontinental highway; and the citizen from the Pacific Coast who applies for one of the tickets has an interest in the treatment he shall receive in respect to it, which is precisely the same it would be if all the roads of the country were one in ownership and in management.”¹

26. The criterion, then, by which to determine whether the construction and operation of any particular railroad may be regulated by Congress, is simply the determination of the question whether the road engages in interstate commerce. By engaging in interstate commerce, we mean making contracts for the transportation of persons or property either beyond the limits of the State, or between points both within the State, when such transportation is in pursuance of a contract which is but part of a contract for transportation between points beyond the limits of the State. “The Daniel Ball” was con-

¹ Third Annual Rep. Int. Com. Comm. 341.

sidered within the power of Congress, although the particular transportation in which she was engaged was, so far as she was concerned, only between points within the same State, but the goods were destined to points beyond the State, and therefore every agency employed in their transportation was engaged in interstate commerce.

Whenever the point of destination of goods or passengers is not in the same State as the point of shipment, and the goods have been started on their final journey out of the State (*Coe vs. Errol*),¹ any railroad which takes any part in their transportation, engages in interstate commerce, and everything about that road, its construction, operation and management, is under the regulating power of Congress. Tried by this test, scarcely a railroad in the country can escape, for, although there may be a few roads which have no rail connection with places outside of a single State—as, for example, the railroads on Long Island—yet even these few roads have more or less intimate connections with points in other States through the agency of stage and water lines, which are either run in connection with them, or sell through tickets in conjunction with them, or, at any rate, furnish them with an interstate traffic in the shape of goods and passengers from points in other States.

27. This is the view which the Interstate Commerce Commission takes of the scope of the power of Congress over railroads, as exemplified in the Interstate Commerce Act, for they require reports and tariffs, etc., from every

¹ 116 U. S. 517 (1886).

railroad in the country. And they held the same in the case of *Mattingly vs. The Pennsylvania Co.*,¹ in which the plaintiff desired an order concerning a transportation over the lines of the defendant between two points both within the State, the transportation desired forming part of an interstate transportation. The defendant was undoubtedly engaged in interstate commerce, but resisted the order, on the ground that the transportation in question was not interstate and therefore not within the power of Congress to regulate, or, at any rate, not within the terms of the Act. The Commission held that the transportation was interstate and within the power of Congress as expressed in the Act.

"The respondent's position is, in brief, that it is a carrier wholly in one State, and therefore not subject to the Act. The fact that the particular transportation demanded in this case is wholly in one State is true, but the conclusion deduced from it is erroneous. It is one of the admitted facts in the case that the respondent is engaged in interstate transportation, and the traffic in question is interstate traffic. These facts are controlling, and make it the duty of the respondent to receive and forward it."²

¹ 2 I. C. R. 806 (1890).

² The U. S. Circuit Court of Oregon has held that the mere fact that a railway wholly within a State, and a vessel running between said State and another, meet at a point within the railway State, and thus form a continuous line of transportation between the two States, does not bring the carriers operating the railway and steamer within the Act, so long as the railway and steamer were under separate control. The Court said, however, that Congress could undoubtedly regulate such transportation. *Ex parte Koehler*, 30 F. R. 867.

CHAPTER IV.

THE POWER OF CONGRESS TO CONSTRUCT RAILROADS.

28. ONE of the principal items of Congressional expenditure has of late years taken the shape of "River and Harbor" bills, by which vast sums have annually been appropriated for the purpose of improving the navigation of rivers and harbors already navigable, and opening up, for the purposes of commerce, rivers not naturally navigable. There has been much controversy concerning the appropriateness and wisdom of these expenditures, but there has seldom been any question made of their legality, that is to say, of the power of Congress to appropriate money for such purposes. Surely it would seem that the clause of the Constitution which took away from the States and transferred to Congress the power to regulate commerce with foreign Nations and among the several States, also conferred upon that body authority to improve or construct the facilities by which such commerce is carried on. It is particularly appropriate that this power should be exercised over rivers because they are not in any sense the property of individuals, but of the people at large, and when, as is frequently the case, they flow between States, the Federal power is the only one which can operate upon them, for no State could have jurisdiction over more than a portion of the river.

29. But although Congress has generally confined itself to the improvement of the facilities of water communication, it has not always done so. The Cumberland Road was built not as a military and post road only, but principally for the purpose of opening up commercial intercourse with the great West, and the same object has been obtained, in recent years, by the construction of the Pacific railroads. The Union Pacific was chartered by Congress, and that body also conferred upon the Central Pacific the right to extend its line in the State of California beyond the point authorized by the charter granted by the State. In a case involving the rights of the State to tax these franchises, the Court, speaking through Mr. Justice Bradley, said: "It cannot at the present day be doubted that Congress, under its power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass those laws. The power to construct, or to authorize individuals or corporations to construct National highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish or maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts

as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations.”¹

30. When Congress has given a railroad company authority to construct a line through a State, neither the State nor anyone else can prohibit the construction of that line. Thus in the important case of *Pensacola Telegraph Company vs. Western Union Telegraph Company*,² the plaintiff sought to restrain the defendant from putting up a telegraph line within certain counties of the State of Florida, on the ground that the State had conferred upon the plaintiff the exclusive right to build telegraph lines in that district. The Court held that Congress had authorized the defendant to construct a line

¹ *Cal. vs. Pac. R. R. Co.*, 127 U. S. 39 (1888).

² 96 U. S. 1 (1878).

wherever there was a railroad which constituted a post road, and that this was a legitimate exercise of the power to regulate commerce and therefore the law of Congress was supreme and the State law must yield. Mr. Justice Field dissented very vigorously and said that the logical deduction from such a decision would be that Congress has power to authorize a company to construct a railroad within a State against the will of the State, and to exercise for that purpose the right of eminent domain, and this would hold true even of a company which had no corporate existence in that State, but only in some other State.

31. The last two points were, of course, not directly involved in the case, for as to the first, the consent of the owners had been obtained, and in regard to the second only the State in its sovereign capacity could complain of the want of corporate existence. But it seems clear that Congress must possess the power of eminent domain for the purpose of constructing a railroad, and hence the power of investing a corporation with that prerogative. In the case just cited, the Chief Justice remarks: "The Government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction." And in *Kohl vs. U. S.*¹ it was decided that the Government of the United States possessed the right of eminent domain for the purpose of acquiring land for government buildings, and this power could be exercised by its own courts, the practice formerly being to request

¹ 91 U. S. 367 (1876).

the State authorities to condemn the land for the government. The Court, after remarking that the right has nothing to do with the tenure by which the land is held, says: "The right is the offspring of political necessity and is inseparable from sovereignty unless denied to it by its fundamental law." And, speaking of the complex system of our government, founded upon independent State and National powers, the Court continues, "Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere it may employ all the agencies for exerting them, which are appropriate or necessary and which are not forbidden by the law of its being. When the power to establish post-offices and create courts was conferred upon the Federal government, included in it was the authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate." It is clear, therefore, that if Congress has power to construct railroads within the States, included in that power is the authority to obtain the land, upon which to construct them, by such means as are appropriate and necessary. If this were not so, then the obstinacy of a few owners, connived at, perhaps, by the policy of a State, might render nugatory the power of Congress to build an interstate railway, for it would impose an impassable barrier in the shape of an impenetrable State.

32. As to the second point, namely, the power of Congress to authorize a corporation of one State to construct a railroad in another State, where it has no cor-

porate existence, it is to be regretted that we have no Supreme Court decisions. The case in which the point was involved was, unfortunately, settled before it had reached the highest tribunal. But we have in the case of *Stockton vs. Baltimore and N. Y. R. R. Co.*,¹ in the Circuit Court, a decision by a very eminent member of the Supreme Court, Mr. Justice Bradley. Congress had authorized the defendant, a corporation of the State of New York, to build a bridge across the Arthur Kill, and to construct certain piers and abutments within the limits of the State of New Jersey. The latter refused to consent to these operations and claimed that, assuming that Congress has power to open up ways of communication by land as well as by water, it could not enable a corporation of another State to exercise corporate powers within the State of New Jersey, which had refused to incorporate it. In deciding this point Mr. Justice Bradley said: "It is undoubtedly just and proper that foreign corporations should be subject to the legitimate police regulations of the State, and should have, if required, an agent in the State to accept service of process when sued for acts done or contracts made therein. . . . But in the pursuit of business authorized by the Government of the United States, and under its protection, the corporations of other States cannot be prohibited or obstructed by any State. And in carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of Congress, and

¹ 32 F. R. 9 (1887).

cannot be molested in another State by State burdens or impediments. . . . When the Constitution was adopted, it could not have been supposed that the regulations of commerce to be made by Congress might be of no avail to commercial corporations, or, at least, might be rendered nugatory with regard to them, in consequence of State restrictions upon their power to act as corporations in any other State than that of their origin." And in another portion of the opinion the learned judge continues: "Still it is contended that, although Congress may have power to construct roads and other means of communication between the States, yet this can only be done with concurrence and consent of the States in which the structures are made. If this is so, then the power of regulation in Congress is not supreme, it depends on the will of the States. We do not concur in this view. We think the power of Congress is supreme over the whole subject, unimpeded and unembarassed by State lines or State laws; that in this matter the country is one and the work to be accomplished is National; and that State interests, State jealousies and State prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no States."

CHAPTER V.

LIMITATIONS UPON THE POWER OF CONGRESS OVER
RAILROADS.

33. Chief Justice Marshall, speaking of the power of Congress to regulate foreign and interstate commerce, says: "This power, like all others vested in Congress, is complete in itself; may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution."¹ These limitations are to be found in the last two clauses of the Fifth Amendment, which provide that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation. So far as these clauses affect the power of Congress over railroads, they may be resolved into the determination of three questions: Is the property regulated private property? Does the regulation amount to "taking" the property or depriving the owner of its use? And, if this is so, is there any lack of due process of law? It would be foreign to our purpose to go into an elaborate examination of this subject, as it might well form the occasion for a separate work. But since the Fourteenth Amendment has made applicable to the States the limitations that the Fifth Amendment imposed upon

¹ *Gibbons vs. Ogden*, 9 Wh. 1-196.

the legislative power of the United States, we may learn something of the nature of those limitations from the decisions which have been had upon the more recent amendment.

34. In the celebrated case of *Munn vs. Illinois*,¹ the Court decided that the State might regulate the rates demanded for the use of grain elevators, and that case was, for a while, considered somewhat radical, not on account of the general principles there laid down, but because the Court decided that they were applicable to the particular circumstances of that case. In other words, the novelty was that grain elevators were held in the same category with common carriers. The Court, speaking through Chief Justice Waite, said: "It is apparent that down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use of private property necessarily deprived an owner of his property without due process of law. The amendment does not change the law in this particular, it simply prevents the States from doing what will operate as such a deprivation." And in another place: "Looking then to the common law, from whence came the right which the Constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the

¹ 94 U. S. 113 (1877).

public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." The principles have recently been reiterated by the Court in *Budd vs. New York*.¹

Judge Hammond, in the *Tennessee R. R. Commission Cases*,² speaking of the power of Congress over commerce, in connection with the *Granger Cases*, says: "There are to be sure, certain limitations on the power, as on all its other powers, arising out of the laws of private right and private property; but it is too late now to deny, in view of these decisions of the Supreme Court, that charges for transportation are a matter of public concern, the private property engaged being dedicated, so to speak, to a public use, and the government may, therefore, exercise certain legislative control of these charges."

35. These remarks apply not only to the regulation of the rates of transportation, but to the manner of, and the means employed in, the transportation itself. Railroads, and the capital invested in them, may be private property, but the use of them for purposes of interstate or foreign commerce is a matter of public concern. The business of carrying on that commerce is the very thing that Congress was given power to regulate, and Congress may

¹ 143 U. S. (1892).

² 19 F. R. 678 (1884).

reasonable charges; that the law neither contemplated nor allowed any issue to be made or inquiry to be had as to their equality or reasonableness in fact, and that in a proceeding by mandamus against the company to compel obedience to the order of the commission, although the company alleged that the rates fixed by the commission were unreasonable, the statute had deprived it of the right to show that judicially. The Court, through Mr. Justice Blatchford, said that that being the construction of the statute, they were of the opinion that it was unconstitutional, inasmuch as the question of the reasonableness of a charge for transportation was eminently a question for judicial investigation, which the law in question prohibited. "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages, for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in the view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of a Court of Justice." Three justices dissented, being of the opinion that the commission, and not the Court, was the proper tribunal to decide upon the reasonableness of rates of charge for transportation.

38. The above decision was as to the validity of a State law, but precisely the same consideration must govern the validity of an Act of Congress. Therefore, in the Inter-

state Commerce Act, it is expressly provided that the reports and findings of the commission shall only be *prima-facie* evidence in any court in which they may be produced.¹ If, however, the law is to be amended so as to make the findings of the commission conclusive evidence, or if, as is urged by some, the commission is to be given power "to enforce its own decrees," it would seem that under the above case it would be necessary to confer upon it judicial powers and functions, and as, under the Constitution, the judicial power of the United States must be vested in courts whose judges hold office during good behavior, the Constitution of the commission would have to be changed.² As the law now stands the hearings before the commission are of no practicable importance, for the conclusions of the commission are a nullity until they receive the sanction of a circuit court, which has, up to this time, always been refused, the courts in each case in which they have been applied to having differed from the commission in their opinion both as to the law and the facts.³

39. The law as to how far a legislature, or a legislative commission, may go in the fixing of rates, is in a very undeveloped and unsatisfactory state. Mr. Justice Field, in *Georgia R. R. & Banking Co. vs. Smith*,⁴ after remarking that the authority of the legislature to regulate

¹ See *Kentucky, etc., Bridge Co. vs. Louisville, etc., R. R.*, 37 F. R. 567 (1889).

² See appendix on the Present Status of the Interstate Commerce Commission.

³ See "The Interstate Commerce Commission in the Federal Courts," in *American Law Register and Review* for March, 1892, Vol. XXXI, No. 3.

⁴ 128 U. S. 174 (1888).

charges for transportation is undoubted, adds: "Subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of the property for public use without just compensation." And Mr. Justice Blatchford, in the Minnesota case, says, quoting from the opinion in *Stone vs. Farmers' L. & T. Co.*:¹ "It is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation." Mr. Justice Brewer, while Circuit Judge for the Iowa District held, in *Chicago & N. W. R. R. vs. Dey*,² that where a schedule of rates has been adopted by railroad commissioners which fixes the charges so low that they will not pay the cost of necessary skilled servants, the cost of the best appliances and keeping the same in proper condition, interest on bonds, and then leave something for dividends, a court of equity should restrain its enforcement. But he also held, at a later stage of the case, that where the evidence as to the probability of loss was so conflicting that the effect of the rates was doubtful, and largely dependent on future developments, relief could not be granted until experience had shown that the rates were not compensatory.³

This last decision shows that the principle announced in the first decision, though undoubtedly just and correct,

¹ 116 U. S. 307-331 (1886).

² 35 F. R. 866 (1888).

³ 38 F. R. 656 (1889).

is not likely to prove available in practice, on account of the almost insuperable difficulties attending its application. It is said, and with great force, that the question is not whether the rates in question do actually afford the carrier any compensation, but whether they are such as ought to afford it a revenue if its business was properly and economically managed. But such a question as this would be entirely beyond the power of the court to satisfactorily deal with, especially when it is called upon to decide such questions before the rates in question have actually been tried. The most that can be said is that no case can be found which holds that a railroad company can be compelled to carry at unremunerative rates. But the right of judicial interference exists only where the rates established will fail to secure the owners some compensation from their investment; and when some compensation is allowed by the rates, the question of the amount of compensation becomes one of legislative policy.

40. In this connection Chief Justice Raney, of the Supreme Court of Florida, well says: "The intricacy of the subject of tariff and freight rates, the importance of the interests involved, and the difficulty of courts dealing efficiently with the matter in ordinary suits, even considering merely the time that would be consumed, has led to the establishment and maintenance of commissions at the expense of the people. Their mission is to do justice as between the people and the railroad companies. They are not expected or presumed to place any restrictions upon a railroad, except those clearly necessary to

effect the purposes of the Constitution and the legislation under it. Where a tariff has been fixed by a commission it must be tested by experiment, unless it is shown or appears upon its face to be destructive of the railroad's interests. Neither the courts nor the railroad company can substitute its judgment for that of the commission, where there is room for difference of intelligent opinion."¹

41. The remedy, therefore, must, in the majority of cases, be political rather than judicial, and it may not be out of place to remark that the seriousness of the situation merits the careful consideration not only of the managers and owners of railroads, but of the community at large, whose interest it undoubtedly is that the railroads of the country should be thoroughly equipped and efficiently operated and kept up. That the prosperity of the railroads, and consequently their usefulness to the public will be very seriously impaired if rate-making is to pass into the control of State and National commissions scarcely admits of question. The fixing of rates is, indeed, but one of the almost innumerable duties devolving upon the management of a railroad, but it is nevertheless the most important, for it is that part of the business in conformity to which all the other parts must be conducted. Receipts invariably control expenditures in the long run, and the poor accommodations afforded by unprofitable roads are notorious. When the State, abandoning its legitimate field of fixing maximum rates

¹ *Pensacola & Atlantic R. R. vs. State*, 37 A. & E. R. R. Cos. 579 (1889).

(little, if any, lower than the average of those already in force), and of remedying particular instances of oppression or discrimination, enters upon an active campaign of rate-making, it is virtually taking into its own hands a portion, but a portion only, of the management of the railroad's business. It is forcing them to admit it into a partnership with them in the conduct of their enterprise, but it is a partnership in which the railroads are the sole contributors and bear all the losses. It is very much as if the consumers should compel the merchants to form a partnership with them, in which the consumers should have the privilege of regulating the prices, and the merchants the task of adjusting, as best they might, the expenses.

When two parties hostile in interest endeavor to jointly manage an enterprise, the attempt must inevitably end in the wrecking of the business and its probable resumption under the sole control of one of the parties. And this is the reason that active participation in rate-making invariably leads to complete government control either by ownership or otherwise. This is the goal which all the continental governments have reached, and though in England they have endeavored to halt half-way, recent events would seem to indicate that there also the government is being irresistibly drawn towards it. In this country, as we have seen, matters are at present in a state of chaos. It is not at all likely that the authorities, State and National, will take any backward step in this respect, and though it would seem that there could hardly

54 THE RAILROADS AND THE COMMERCE CLAUSE.

be a more tyrannical exercise of power than that a community, which is unwilling to bear the burdens incident to the ownership of property, should yet be permitted to reap all the benefits of ownership, by securing to itself the right to use that property at a rate of compensation to be fixed by itself, nevertheless, the law is clear, that there is no provision either in the State or National Constitutions which can be effectively invoked in opposition to this tyranny. Perhaps the wisest course for the owners of railroad property to pursue would be to endeavor to induce the government to purchase their roads now, while the latter are still valuable properties, rather than to wait until years of disastrous operation shall have so reduced the value of the investment that the investors will be compelled to accept whatever the government may choose to offer.

The courts have fully appreciated the dangers incident to the exercise of such powers by legislatures, but have felt that the evil is one beyond the power of the judiciary to guard against. In *Wellman vs. Chicago & Grand Trunk R. R.*,¹ Mr. Justice Cahill, of the Supreme Court of Michigan, says: "No more important question than that involved here has ever come before this Court. The issue is clearly made up, and we are to determine, perhaps for all time the power of the State over the railroads built under the sanction of its laws. There are candid and thoughtful men, who love justice and hate oppression, who fear for the result if this great public interest is

¹ 140 N. & E. R. R. Cos. 249 (1890).

given over to legislative control, freed from any judicial supervision. I do not join in those fears, but if I did I could not change my views of the power which the Constitution has vested in the legislature over this subject. A legislator who, in the exercise of this great power committed to him by the Constitution, suffers himself to be influenced by any motive except a desire to deal justly between the people and those who, by putting their fortunes into the railroads, have enriched and made prosperous our commonwealth, is an enemy of the State, and unworthy of citizenship in it."

In every country in which the people govern, the only salvation of the property owner must ultimately be found in the sense of justice prevailing in the community. No one ever appreciated this more fully than Chief Justice Marshall, who, in speaking of the extensive powers conferred upon Congress by the Commerce Clause, said: "The wisdom and discretion of Congress, their identity with the people and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints upon which the people must often rely solely in all representative governments."¹

¹ *Gibbons vs. Ogden*, 9 Wh. 1-197.



PART II.

THE COMMERCE CLAUSE AND STATE RAILROAD LEGISLATION.

CHAPTER VI.

THE POWER OF THE STATE TO REGULATE COMMERCE.

42. The Constitution having conferred upon Congress the power to regulate interstate and foreign commerce, the question which has occupied the judicial mind for many years is, Does the grant of that power to Congress necessarily deprive the States of the right to exercise it? Without going into the merits of the controversy on this subject, which is one of the most interesting in Constitutional law, we will quote the latest utterance of the Supreme Court upon the question. In the now famous case of *Leisy vs. Hardin*,¹ Chief Justice Fuller says: "The doctrine now firmly established is, as stated by Mr. Justice Field in *Bowman vs. Chicago Ry. Co.*,² 'that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operations, such as harbor pilotage, the improvement of har-

¹ 135 U. S. 100 (1890).

² 125 U. S. 465-507 (1888).

bors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority, but where the subject is National in its character and admits and requires uniformity of regulation, affecting all the States, such as transportation between the States, including the transportation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of the article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import thus mingled.’”

43. Now the part which railroads take in interstate commerce is that of transporting the subjects of commerce from State to State. “Beyond all question,” says Mr. Justice Strong, “the transportation of freight, or the subjects of commerce, for the purpose of exchange or sale

is a constituent of commerce itself.”¹ And the same has been decided as to the transportation of passengers in *Gibbons vs. Ogden*.² If the chief business of railroads, then, is a constituent of commerce itself, is it of such a nature as to require uniform regulation? “It will not be denied,” says Mr. Justice Field, “that that portion of commerce with foreign countries and between the States, which consists in the transportation and exchange of commodities, is of National importance and admits and requires uniformity of regulations. The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation.”³ And the same idea is very clearly stated in the case of *County of Mobile vs. Kimball*:⁴ “Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in those terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can only be one system of rules applicable to the whole country alike; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is, therefore, not permissible.” And to the same effect is *Leisy vs. Hardin*.⁵

¹ *State Fr't Tax Cases*, 15 Wall. 232 (1878).

² 9 Wh. 1.

³ *Welton vs. Mo.*, 91 U. S. 275-280 (1876).

⁴ 102 U. S. 691 (1881).

⁵ 135 U. S. 100 (1890).

44. These decisions show conclusively that it is beyond the power of the States to regulate interstate railroad transportation. Of course there are many State laws, which, by acting upon the persons or instrumentalities engaged in commerce, irrespective of their employment, often seriously affect commerce, but nevertheless do not, in substance, amount to regulations of it. We shall take up in another chapter, the discussion of the question as to what are and what are not regulations of commerce. It may, however, be remarked generally that all regulations of rates and fares and the contract of transportation are, whatever else they may be, essentially regulations of commerce. In the language of Chief Justice Waite, in *Hall vs. DeCuir*,¹ "We think it may be safely said that State legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress." Regulations of commerce in the shape of tax laws will be considered in a separate chapter.

45. As illustrative of the application of the principles above stated, it may be instructive to look at a few cases. The most important one is that of *Wabash, etc. Ry. vs. Ill.*² In that case the railroad company had charged A at the rate of twenty-five cents a ton for transporting freight from Gilman, Ill., to New York, and on the same day charged B fifteen cents a ton from Peoria, Ill., to New York, the second transportation being eighty-six

¹ 95 U. S. 485 (1878.)

² 118 U. S. 557 (1886).

miles further than the first. A sued the company under a statute of Illinois, which prohibited the charging of the same or a higher rate for a short, as for a long distance. The Supreme Court of the State held that the statute applied to such a case, that is to contracts for interstate transportation, whenever that transportation began or ended in Illinois. This statute, it will be observed, though professing to deal only with that part of the interstate transportation which was carried on within the State, in reality extended its effect throughout the country, and must necessarily influence the carrier in the management of its business throughout its entire line. For as soon as the carrier in Illinois had contracted for a transportation wholly within the State, say from Sheldon to Gilman, at a certain rate per mile, the whole world was prevented from contracting with it for the carriage of goods or passengers to or from Illinois, which contract involved transportation between Sheldon and Gilman, at a lower rate. Whatever might be the rate per mile from Gilman to Sheldon, a distance of twenty-six miles, the same rate must be charged from Peoria to New York. In short, the carrier's freedom of contracting for transportation to or from other States was restricted by a State law which compelled it to make its contracts for interstate carriage preserve a certain relation to those for carriage within the State. "The obvious injustice of such a rule as this," says Mr. Justice Miller, "which railroad companies are by heavy penalties compelled to conform to in regard to commerce among the States, when

applied to transportation which includes Illinois in a long line of carriage through several States, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interest of all the States and of the railroads concerned, better fits it to establish just and equitable laws." The law was accordingly held void.

So also a Statute of Iowa, fixing the maximum rates which should be charged for transportation between points within the State, which was decided to include cases in which that transportation was only part of a through shipment from points in other States, was decided by the Supreme Court of Iowa to be void as to such a shipment.¹ Counsel had contended that the law of Iowa entered into and became part of a contract made in Iowa, for shipment out of the State. In reply the Court said: "If the law entered into and became part of the contract of shipment we would have a law of Iowa which would control and regulate the transportation of freight not only to the remotest parts of the States and Territories of this country, but extending to all Nations of the earth to which lines of common carriers extend, and to which local carriers may undertake to transport goods. That such legislation is National in its character, it seems to us, must be conceded."


In the Tennessee Railroad Commission Cases,² it was

¹ 22 American Law Register 373.

² 19 F. R. 678 (1884).

held that a statute of Tennessee giving to a commission power to regulate rates for transportation within the State, could not apply to transportation which was only part of a through shipment. It was urged in this case as in all the others, that the State might regulate that portion of an interstate transportation which took place within its limits, because such a regulation only affected interstate commerce incidentally, but says Judge Hammond :

“ It is, in fact, the most direct, and, of all regulations the most vital to that intercourse we call commerce, to control the compensation for that transportation by which an exchange of commodities is affected ; for without the transportation there can be no exchange between different places, and it is therefore the chief element of interstate commerce. It is like saying the control of the circulation of the blood for a space of one inch along the aortal trunk affects the victim's life only ‘ incidentally,’ to say that the control of the rates of compensation for that part of a great line of interstate commerce, lying between the boundaries of a State, so affects that commerce. The injury may be small, but it is not the less direct, and not at all incidental, because it is only slight. If Tennessee may control the rates for interstate commerce within its boundaries, Kentucky may, and so on, until the States have usurped the regulation of the whole matter.” And Mr. Justice Miller in the *Wabash Case*, after stating that the real question is how far a charge made for a continuous transportation over several States



which included a State whose laws were in question, might be divided into separate charges for each State, in enforcing the power of the State to regulate the fares of its railroads, comes to the conclusion that "We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this Court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

46. Nor does it make any difference that such laws may be considered police regulations. Says Mr. Justice Strong, in *Railroad vs. Husen*,¹ "Whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of National government." It was said in *Henderson vs. Mayor*² to "be clear from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States." Substantially the same thing was said by Chief Justice Marshall in *Gibbons vs. Ogden*:³ "Neither the unlimited powers of the State to tax, nor any of its large police powers, can be exercised to such

¹ 95 U. S. 465 (1878).

² 92 U. S. 259 (1876).

³ 9 Wh. 1.

an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution.” “It does not advance the argument much,” says Judge Hammond, “to invoke the police powers of the State to support this Act of the Legislature, for, with noticeable emphasis, it is held in the last two cases cited, as everywhere, that neither in the exercise of the police nor any other power, can the State make a law which is in effect a regulation of interstate commerce.”¹ This conclusion is fully supported by the two latest cases in the Supreme Court, *Leisy vs. Hardin*,² and *Minnesota vs. Barber*.³ Strictly in line with the above cases is the recent one in the Court of Common Pleas for Philadelphia County, of *Wigton vs. Pennsylvania R. R.*,⁴ in which it was held that the statute of Pennsylvania punishing railroads for making discriminations in rates, was void as to rates for transportation to or from points without the State, because a regulation of interstate commerce which should be National in its character.

47. It must therefore be concluded, as the result of these cases, that the States cannot regulate the fares and charges of railroad companies for any transportation which forms part of interstate commerce. But suppose the transportation does not form part of interstate commerce? Says Mr. Justice Miller: “It has often been held by this Court and there can be no doubt about it that there is a com-

¹ 19 F. R. 678 (1884).

² 135 U. S. 100 (1890).

³ 136 U. S. 317 (1890).

⁴ 25 W. N. C. 574 (1890).

merce wholly within the State that is not subject to the constitutional provision, and the distinction between commerce among the States and the other class of commerce between the citizens of a single State and conducted within its limits exclusively, is one which has been fully recognized in this Court, although it may not be always easy where the lines of these classes approach each other to distinguish between the one and the other.”¹

48. Now what are the limits of this commerce which is said to be wholly internal? In the first place, by its very terms, it excludes transportation which actually crosses State boundaries. But the question next to be considered is whether it is the status of the railroad or the nature of the contract which determines the character of the transaction. That is, can the State regulate all transportation on a road beginning and ending within its limits, or only such portion of that transportation as is not part of a through shipment to or from points without the State? This depends upon when interstate commerce in an article commences; that is to say, whether the transportation is interstate from the moment when the contract for shipment to a point without the State is made, and the article delivered to any one of a chain of carriers to be transported under that contract, or only from the time that it comes into the hands of the carrier, which actually does carry it out of the State.

49. In the case of “The Daniel Ball,”² the Supreme

¹ *Wabash, etc. Ry. vs. Illinois*, 118 U. S. 557 (1886).

² 10 Wall. 557 (1871).

Court, speaking through Mr. Justice Field, said : "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that article between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transaction."

Accordingly in that case the transportation of goods between two points, both within the State, was considered interstate commerce because the goods were destined to points outside of the State. And in *Coe vs. Errol*,¹ speaking of goods in the course of transportation to other States, Mr. Justice Bradley says, "There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the National law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination." And in another place, "Goods intended for exportation to another State do not cease to be part of the general mass of property within the State, subject as such to its jurisdiction, and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have started upon such transportation in a continuous route or journey." And speaking of goods not so shipped or entered, but

¹ 116 U. S. 517 (1886).

merely on their way to some town or station serving as an entrepôt and shipping point for a particular region, which was the predicament of the goods in question in that case, the Court says that such transportation is merely preliminary and performed for the purpose of putting the property in a state of preparation and readiness for interstate transportation. "Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State."

These extracts make it clear that when the destination of a commodity to a point without the State is fixed and certain, commerce in that commodity has commenced. Therefore, whenever a carrier is engaged in transportation, which, by reason of the origin and destination of the goods carried, is interstate, that carrier is engaged in interstate commerce, and is not subject, as far as concerns such commerce, to the regulations of the State, although the actual transportation undertaken by it may be entirely within the State.

50. But whenever the goods which are delivered to a carrier are delivered to him only to be transported locally, between points both within State, and not as part of a contract for interstate carriage, such transportation is not interstate commerce, although the goods may, in fact, have come from without, or be intended eventually to go beyond the limits of the State. The character of the busi-

ness depends upon the nature of the contract which the carrier undertakes to perform, and the intention of the shipper is immaterial, unless he makes the carrier party to it by embodying in it his contract of shipment.¹ Local transportation as thus defined may undoubtedly be regulated by the State. For example, the State of Pennsylvania may make any regulation it deems expedient as to fares between Philadelphia and Pittsburgh, and such regulations, although they would be inoperative as to passengers travelling between those cities on through tickets from or to points without the State, would nevertheless be perfectly valid as to passengers travelling on local tickets, no matter whence they come or whither they go. New Jersey may regulate the railroads between Camden and the shore as to passengers who get on at Camden, but not as to those who buy tickets in Philadelphia, if those tickets include ferry passage over the Delaware. These fine distinctions may not rest on very strong economic or scientific grounds, but they are the logical and necessary outcome of that wonderful system of State and National sovereignties under which we live and which this, and many other instances, demonstrates, was the offspring of political rather than economic necessity. That the result is inconsistent with the satisfactory regulation of the commercial interests of the country only shows the appropriateness of Congressional legislation to solve the problem.

51. One point in this connection still remains unsettled.

¹ *Coe vs. Errol*, 116 U. S. 517 (1886).

It is one of some nicety. Can a State regulate the transportation of persons and property between points within the State, when the line by means of which the transportation is carried on passes, for a portion of the distance, outside the limits of the State? It is true that such a business, though undoubtedly interstate transportation, is not technically commerce among the several States, for commerce, as usually defined, means the interchange of commodities for the purpose of traffic, and in this case there is no such interchange. Yet this is a commerce which, in respect to one of its constituents, the transportation, does concern more States than one, and it must be admitted that the whole trend of the recent decisions has been towards the obliteration of any distinction that might formerly have existed between the terms transportation and commerce. Mr. Justice Wayne in the Passenger Cases¹ quotes Martens, in his "Summary of the Law of Nations," as saying: "Commerce consists in buying from one Nation and selling to another, or *transporting the merchandise from the sellers to the buyers to gain the freight.*" This language is cited with approval in the State Freight Tax Case,² by Mr. Justice Strong, who adds: "Nor does it make any difference whether this interchange of commodities is by land or by water. In either case *the bringing of the goods from the seller to the buyer is commerce.*"

52. Indeed, it is only as transporters that railroads

¹ 7 Howard, 283-416 (1849).

² 15 Wall. 232-275 (1873).

come under the Commerce Clause at all. That the State through which the transportation line runs has an interest in that transportation, and consequently in the commerce which is the cause of it, is evident when we consider how vitally even the mere physical operation of a railroad affects a community. The comfort and safety of the people of New Jersey are very directly concerned in the transportation of large quantities of merchandise or passengers through that State, even though that transportation begins and ends in Pennsylvania. New Jersey has also a direct pecuniary interest in it, for the successful conduct of such a business involves the investment of capital and the employment of labor in that State, to an amount proportionate to the business done. The prohibition or obstruction of such a measure by the State of Pennsylvania would be a detriment to New Jersey directly in proportion to the extent to which the operation of the road in the latter State was hindered or obstructed. A prohibition by New Jersey, on the other hand, would be an injury to Pennsylvania, not only on account of its hindering the operations of the portions of the line within the latter State, but also because of the obstruction of the internal commerce of the State.

53. The Interstate Commerce Commission has accordingly held that such a commerce is within the Interstate Commerce Act,¹ and the Supreme Courts of Minnesota² and South Carolina³ have decided that the Constitution

¹ *New Orleans Cotton Exch. vs. N. O. & T. P. R. Co.*, 2 I. C. R. 289 (1888).

² *State vs. Chicago St. P., etc., R. Co.*, 2 I. C. R. 519 (1889).

³ *Sternberger vs. Cape Fear & Y. V. R. Co.*, 2 I. C. R. 426 (1888).

of the United States will not permit a State to regulate the rates and fares of a transportation part of which takes place in another State. The Supreme Court of Pennsylvania, however, has held that Pennsylvania may tax the gross receipts received from transportation between two Pennsylvania points, through New Jersey.¹ The Court must have considered that this was a commerce which the State of Pennsylvania had power to regulate, for, as will be explained later on, a State cannot tax a commerce unless it can also regulate it, for to tax is to regulate. The Court said, "In principle the case before us does not seem to be within the mischief which the Commercial Clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form may be." Whether the Supreme Court of the United States will hold that the State may regulate this commerce is uncertain. For Chief Justice Marshall in *Gibbons vs. Ogden*² said that the Constitution was intended to prevent any State interference with "any commerce which concerns more States than one," and the commerce in question is certainly of that character. With all due deference, therefore, to the learned tribunal whose opinion we have cited, we incline to the view held by the Supreme Courts of Minnesota and North Carolina, that the protection of the Commerce Clause extends over commerce which is merely interstate in regard to the transportation

¹ *Commonwealth vs. L. V. R. R. Co.*, 22 W. N. C. 525 (1888).

² 9 Wh. 1.

involved, as much as it does over commerce which is interstate in all respects.

54. We come to the conclusion, therefore, that the power of the State to pass laws regulating commerce is confined to commerce which is purely internal, meaning by that term commerce involving transportation, entirely within the limits of the State, of passengers and property whose points of origin and destination are also both within the State. State laws regulating any other commerce, that is, commerce which involves transportation not wholly within the limits of the State, or of passengers or property whose points of origin and destination are not both within the State, are unconstitutional and void.

55. The view we have taken renders it unnecessary to consider the effect, upon the legislation of the States, of the passage of the Interstate Commerce Act. State laws which are regulations of interstate or foreign commerce are void without regard to Congressional action.¹ Of course, if there should arise a conflict between a State law regulating internal commerce, and the Interstate Commerce Act, or any other law enacted by Congress in pursuance of its power to regulate interstate and foreign commerce, the law of the State would, to that extent, be void, for the power of Congress, over the subjects committed to its care, is supreme.² This results from the declaration in the Constitution that the Constitution and the

¹ *Leisy vs. Hardin*, 135 U. S. 100 (1890).

² *Gibbons vs. Ogden* (1824); *Brown vs. Md.* (1827); *Sinnot vs. Davenport*, 22 How. 227 (1859); *People vs. Compagnie Generale*, 107 U. S. 59 (1883).

laws made in pursuance thereof shall be the Supreme law of the land, and that the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.¹

¹ Art. VI. 2.

CHAPTER VII.

STATE LAWS REGULATING THE INSTRUMENTALITIES OF
COMMERCE.

56. In investigating the nature and scope of the power of Congress to regulate commerce, we endeavored to show that the power of Congress over the instrumentalities of interstate commerce is practically unlimited, because, since Congress could act directly upon the commerce itself, there is no need to look at the character of the regulation, but only to the nature of the commerce which the instrument is engaged in. In other words, the power of Congress over railroads arises from the fact of there being instrumentalities of a business which Congress has power to control. Now the power of the State over such instrumentalities is based upon the fact of there being, irrespective of the business they are engaged in, proper subjects for local regulation. For it must be remembered that individuals and corporations engaged in interstate or foreign commerce, have other relations to the community, in which their operations are carried on, than those which grow out of the business they are concerned in. They are citizens first, whatever else they may be, and as citizens they owe certain duties to other citizens and the community at large, from the performance of which no occupation can absolve them, and for the violation of which

no business or calling can be an excuse. The busy merchant may find it a serious interference with his business to be called upon to serve on juries, but no court in the country would excuse him because his business was interstate commerce, nor would such a court consider it any defence to an indictment for swindling, to set up that the goods sold were imported from another State. The owner of a large warehouse may be compelled to put up a fire-escape, although the building is used exclusively for interstate goods.

In like manner, the transportation of goods and passengers, though it is the principal element of commerce, is also an operation in whose safe and careful conduct the community has many other than commercial interests. The right to carry on interstate commerce in the city of Philadelphia may be one which neither that city nor the State of Pennsylvania can infringe, but this does not enable a company proposing to carry on such a business, to construct a steam railroad across the streets of the city. And it would be no defence to an indictment for manslaughter for an engineer to set up that the engine negligently run was engaged in hauling an interstate train. In these, and in all similar cases, the State, as the protector of the health, safety and welfare of its citizens, may regulate the conduct of persons within its borders, and their manner of using property within the State, as far as may be necessary to protect its citizens, and such laws, unless they be regulations of commerce in disguise, are valid, although they may seriously, but indirectly, affect

commerce. As was said by Mr. Justice Strong, in *R. R. vs. Husen*,¹ "Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. . . . While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health or property within its borders,—it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under cover of exerting its police powers substantially burden either foreign or interstate commerce." And speaking again of the police powers: "As its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion." This doctrine has been frequently affirmed, especially in *Leisy vs. Hardin*,² and *Minnesota vs. Barber*.³

57. The problem, then, is to lay down certain general principles by which to determine what laws are, and what are not, regulations of commerce, and to apply those principles to the ordinary railroad laws of the States. An instructive case for this purpose is that of *Sherlock vs. Alling*.⁴ The State of Indiana enacted a law that whenever a person was killed, under circumstances which would have given him a cause of action had he lived,

¹ 95 U. S. 465 (1878).

² 135 U. S. 100 (1890).

³ 136 U. S. 317 (1890).

⁴ 93 U. S. 99 (1876).

an action might be brought by his representatives after his death. The plaintiff in the case was the representative of a man who had been killed by a steamboat collision, occurring within the jurisdiction of Indiana, and occasioned by the negligence of the defendant. As this law created a liability which did not exist, either by the common or maritime law, it was argued that it imposed a burden upon interstate commerce. But the Court said, through Mr. Justice Field, that in all cases in which State laws had been held void because regulations of commerce, the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or by prescribing conditions in accordance with which it was required to be conducted. The opinion then continues: "In the present case no such operation can be ascribed to the statute of Indiana. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. General legislation of this kind, prescribing the liabilities or duties of citizens of a State without distinction of pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated or property descend or be distributed on the death of the owner, because applicable to contracts or estates of persons engaged in such commerce. In conferring upon

THE COMMERCE CLAUSE.

Commerce it was never intended that Congress should legislate upon all subjects, the life and safety of their persons might indirectly affect the

and relied upon in two very cases which arose eleven years ago, and Nashville, etc., Ry. Co. The law of Alabama required all conductors within the State to be licensed for such employment and were found to possess the proper qualifications, and provided with a license from the State. The defendant was set up as a defence that he was a through train from a point within the State, and was therefore engaged in interstate commerce, and hence the law was void as to him, by recklessly running his train, and the death of any one within the State or not, it cannot be contended that he was engaged by the State for manslaughter in operating an interstate train, and cannot be punished under the Commerce Clause in the absence of Congressional action at all, for although such

conduct is an offence at common law, the United States has no common law,¹ and its courts cannot therefore punish such an action. True, the United States courts do sometimes enforce the common law, but only as part of the local law of the State whose laws they are administering.²

Nor is this result confined to criminal actions. If the engineer of an interstate train cannot be punished under the laws of the State for reckless conduct causing death or injury, neither can the company be sued for damages resulting from such negligence. As the Court says in the first of the above cases: "But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him, for if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then in the absence of laws passed by Congress, or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress supplies it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an

¹ *Wheaton vs. Peters*, 8 Pet. 591 (1834).

² *Railroad Co. vs. Lockwood*, 17 Wall. 357 (1873).

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in this respect between the common law and the statute law? Says the Court in the case under consideration, speaking of the law in *Sherlock vs. Alling*, as an addition or amendment to the general body of the law previously existing and regulating the relative rights and duties of persons within the State: "This general system of law, subject to be modified by State legislation, whether consisting in that customary law which prevails as the common law of the land in each State, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the legislature of each State, except as that will may be restrained by the Constitution of the United States."

59. Now if the State may enact laws defining what acts of common carriers, whether interstate, foreign or domestic, shall be considered offences, and providing for their punishment, and may also define and declare the duties and obligations of common carriers to the individuals who employ them and to the public in general, and may provide the manner in which these rights may be enforced and their infraction redressed, what is there to prevent the State from prescribing the precautions and safeguards necessary and proper to prevent, by anticipation, those

wrongs and injuries? If the State may declare an injury suffered by reason of some safeguard not having been provided, or some precaution not having been taken, a wrong, and provide for its redress, there is certainly no reason why it cannot expressly require that such safeguards *shall* be provided, and that such precautions *shall* be taken, and provide for the punishment of those who neglect or refuse to comply with such regulations, whether or not such negligence is followed by an accident. It may even take the matter into its own hands and itself provide the safeguard, in the shape of an official inspection of the instruments used by the carrier in conducting its business, and to make this precaution effectual, may prohibit the employment of any instruments not so inspected and found satisfactory. "And it may be said generally that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only remotely and indirectly affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."¹

60. But, under the guise of legislating upon the instrumentality, the State cannot actually regulate the commerce in which it is employed, if that commerce be foreign or interstate. An illustration of this is the case of *Hall vs. De Cuir*.² The State of Louisiana enacted a law

¹ *Sherlock vs. Alling*, 93 U. S. 99 (1876).

² 95 U. S. 485 (1878).

making it unlawful for common carriers to refuse admission to their conveyances, or to expel any person whatsoever, except on account of lack of accommodation, or the neglect or refusal of the passenger to pay the customary fare or his disorderly conduct, etc., and provided that such rules as should be made for this purpose should not make any discrimination on account of race or color. The Supreme Court of the State held that this Act compelled the owner of a steamboat on the Mississippi, engaged in interstate commerce, to allow all persons carried within that State equal rights and privileges in all parts of the conveyance, and that therefore a colored person who was taken on board to be transferred between two points within that State, was entitled to damages for having been refused admittance into the cabin reserved for whites.

It will be noticed that whatever else this law might have been, it was certainly a regulation of commerce, for it sought to govern the carrier in his choice, not so much of the manner in which he should carry on his business, but of what that business should consist. The carrier proposed to provide accommodations for a certain kind for people of a certain class, but the State said that this should not be done with regard to persons taken up for local transportation. Hence it was manifestly a regulation of commerce, and not a regulation of the instrumentality, affecting commerce. But as the local commerce is itself subject to regulation by the State, and is only an instrument or auxiliary of commerce, regulations concerning it will be valid although they more or less affect interstate

commerce. But when in pursuance of its power to regulate its domestic commerce, the State passes laws which amount to regulations of interstate commerce also, they are, so far, void. "But when a plain and unmistakable case of direct action on commerce itself is presented,—as all regulations or restrictions on the contract of transportation must be, all that may be looked to is the character of the commerce so regulated, and if it be interstate transportation, regulation or restriction by the State is void."¹ Thus in this case the steamboat owner proposed to make a contract with a passenger for interstate carriage, by which he engaged to furnish accommodations free from colored people, but the State prevents his making or carrying out that contract, by compelling him, when he comes within the State, to allow colored persons to penetrate all portions of the vessel. It would have been the same had the State forbidden a railroad company from excluding smokers from any car on any train, for this would have compelled anyone coming from another State to submit to something which he considered an annoyance, and which he had stipulated in his contract for interstate transportation should not occur, and submission to which could not in any sense be said to be necessary for the preservation of the health and safety of the community.²

¹ *Tenn. R. R. Commission Cases*, 19 Fr. 710.

² The Supreme Court of Indiana, in *State vs. Indiana & Ohio Gas Co.*, 2 I. C. P. 758 (1889), held that a statute prohibiting the piping of natural gas or petroleum to any point without the State, was void. But the same Court held valid a statute limiting the pressure at which natural gas should be conveyed in pipe lines. *Jamison vs. Indiana Natural Gas & Oil Co.*, 3 I. C. R. 613 (1891). The Court of

61. In the case of *Western Union Telegraph Company vs. Pendleton*.¹ The law in question required every telegraph company to send messages in the order in which they were received, and forbidding them, with certain exceptions, to give precedence to any message, and that the messages should be delivered by messenger whenever the recipient lived one mile of the station. This, it will be seen, was substantially similar legislation to that in the case above. It was an attempt on the part of the legislature of the State to declare what contracts the company might make in conducting their business, and in what manner they should carry out those contracts. In fact, it attempted to add two terms to every contract which the company made: 1st., That the message should only be postponed for certain reasons. 2d., It should be delivered by a messenger. Plainly, then, this statute was aimed at the business itself, and where that business was interstate commerce, it was void. It did not seek to govern the actions and operations of the company within the State, in the general aspect of those actions as things done in the community and affecting its welfare, but as a part of a particular business, and was simply a regulation of that business, and consequently void. In reply to the suggestion that the law was justified by the police powers, the Court said: "Undoubtedly, under the reserve powers of the State which are designated under the somewhat am-

Appeals of Virginia held a statute limiting the number and character of freight trains which could be run on Sundays on railroads within the State, void as to interstate trains. *N. & W. R. R. vs. Virginia*, 3 I. C. R. 671 (1891).

¹ 122 U. S. 347 (1887).

biguous term of police powers, regulations may be prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations with respect to all these there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution." It does so encroach whenever its legislation amounts to a regulation of interstate commerce, although it may be cloaked under a regulation either of the instrumentality or of the local commerce.

62. The difficulty in each case is to determine whether a law is, or is not, a regulation of commerce. As Chief Justice Waite says, in *Hall vs. DeCuir*:¹ "The line which separates the powers of the State from the exclusive power of Congress is not always strictly marked, and sometimes it is not easily determined on which side a particular case belongs. Judges not infrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to attempt to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved."

63. Perhaps, for the purpose of the subject under consideration, the best test that can be given is this: Are the rights and duties which the Act seeks to modify those which spring from the relation of the parties, or those

¹ 95 U. S. 485-488 (1878).

which more properly arise from the contract between them. If the first is the case, and the law can be considered as a proper one for the preservation of the good order, peace, or protection of the community then it is valid, no matter how it may affect commerce. But if it be essentially an attempt on the part of the State to deal with matters which are more properly the subject of *contract* between the carrier and the person employing him, then it is an attempt to restrict his freedom in making contracts, and must be void when the contract sought to be made is one in the course of interstate transportation. The grounds for this theory have already been discussed. It is simply an epitome of the general principles laid down in *Smith vs. Alabama*, and *Hall vs. DeCuir*, that all the rights, duties and liabilities which arise from the status of common carriers, and their relations to the persons employing them and the community at large, must exist by virtue of the local law, and may be modified by the authority to whose sanction the local law owes its force and effect; but that all rights, duties and liabilities which have their origin in a contract between the parties, and have no connection with the good order, peace and safety of the community, but only with the convenience or commercial advantage of the contracting parties, can only be modified or added to by the authority which has exclusive jurisdiction of the subject-matter of such contracts.

64. Perhaps the difference between the two classes of regulations can be better explained by taking a concrete example. Suppose, for example, the legislature of a State

should enact a law that hereafter no oil lamps should be used in passenger trains running on the railways of the State. Clearly, such a regulation, being calculated to preserve the safety and welfare of the travelling public, would be of obligatory force upon all railways within the State, whether engaged in carrying interstate passengers or not, and whether the trains were entirely within the State, or ran also to points outside. It is the State law which defines the liability of the carrier in case he should, by providing improper lights, cause injury to persons and property, and therefore that law, which redresses the injury, may also provide for its prevention, by prohibiting the use of articles likely to cause it. Therefore that rule must apply also to trains engaged exclusively in interstate transportation, and only passing through the State, for there is no separate system of law for persons travelling through the State as distinguished from persons remaining in it.

Should, however, the legislature enact that hereafter all railroad cars in the State shall be provided with lights sufficiently brilliant to enable passengers to read with ease in all parts of the car, a very different question would be presented. Such a law could in no sense be considered a law dealing with the rights and duties which can be supposed to arise out of the status of the parties, as carrier and passenger, for no one would suppose that the health and welfare of the community required that cars should be sufficiently well lighted to read in, or that any injury, of which a court would take cognizance, had been inflicted

upon a passenger who had been compelled to sit idle, when, had the company provided him more comfortable and suitable accommodation, he might have read an interesting book. The law would simply add an additional term to all contracts for carriage, defining what service the passenger should have a right to expect for his money ; in no way differing from a law regulating how much the carrier should have a right to expect to receive for his services. A law of the latter kind we have seen is void as to contracts for interstate carriage,¹ and so also a law of the former.² Such laws are regulations of commerce in the plain meaning of the term. Therefore, if the railroad company chooses to provide less comfortable accommodations for its interstate passengers, the State could not interfere and regulate the contractual relations between them by requiring the company to furnish more luxurious appointments for such passengers, nor could the passengers themselves sue for damages under such a law, for not furnishing accommodations which they had not contracted for.

Consequently when the State of Missouri enacted a law requiring all railroads within the State to furnish double-decked cars for the shipment of sheep, the Supreme Court of the State held that the law was void as to interstate shipments.³

65. And we think the same view would be taken by the

¹ *Wabash, etc., R. R. vs. Ill.*, 118 U. S. 557 (1886) ; *Carton vs. Ill.*, Cent. R. R., 22 Al. Reg. 373.

² *W. U. Tel. Co. vs. Pendleton*, 122 U. S. 347 (1887).

³ *Stanley vs. Wabash, etc., R. R.*, 3 I. C. R. 176 (1890).

Supreme Court of the law of Illinois which is as follows :
 “ Every railroad corporation shall cause its trains to stop upon arrival at each station advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety. PROVIDED, all regular passenger trains shall stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety.” An action having been brought to recover a penalty from the railroad company for refusing to stop at a certain county seat at which the train was not advertised to stop, on account of which refusal the plaintiff was unable to take the train, the Supreme Court of Illinois held that the penalty was recoverable as the act was a legitimate exercise of the police powers.¹

Now we think this view may well be questioned. The provision that trains which were advertised to stop should stop long enough to insure the safety of persons getting on or off was undoubtedly a typical and legitimate exercise of the State's power to provide for the safety of the community. Such also would have been an act regulating the speed of all trains while running through county seats, and even perhaps requiring them to stop there. But an Act requiring them to stop long enough to receive and let off passengers at every county seat was simply, and on its face, an attempt to accomplish indirectly, under the guise of a police regulation, what the State would not do

¹ Chicago & Alton R. R. vs. Ill., 13 A. & E. R. R. Cas. 42 (1883).

directly, namely, compel the company to carry local passengers on all-through trains, and prohibit it from devoting a train exclusively to interstate business. It was palpably a regulation of the contract of transportation, and therefore void as to interstate transportation.

66. But State laws regulating the character of the accommodation which railroads shall furnish, though admittedly regulations of commerce, must be enforceable as to that commerce which it is acknowledged the State may regulate, unless in such enforcement the regulation of a commerce which only Congress can regulate is necessarily involved. For example, the laws would undoubtedly be good as to any train running entirely within the limits of the State, and not engaged in carrying interstate passengers. Is its application prevented because interstate passengers may happen to share in the superior accommodations which must be provided for local traffic? The effect upon such interstate commerce is certainly incidental, and does not make the law a regulation of it. Nor is it material that the cars so fitted are actually used on trains running out of the State. All that the law requires is that when a railroad company engages in local commerce it must provide certain facilities for that commerce, and the fact that since the same instruments are used for interstate commerce, that commerce will also partake of those facilities, is immaterial, unless the necessity of complying with those regulations as to local commerce will impede the carrier in contracting to provide certain accommodations for interstate commerce. But such an im-

pediment must be a direct and substantial one, one which practically prevents the carrier from making contracts of a certain kind, as in *Hall vs. DeCuir*. It will not be sufficient that the necessity of complying with the regulations concerning local commerce will make it more troublesome or expensive to make such contracts, provided the contracts can still be made, and provided that the effect be an indirect effect of the regulation of the local traffic.

67. Thus a law of Mississippi requiring all railroad companies in the State to provide separate accommodations for whites and negroes, under which a railroad company was indicted for neglecting to provide such accommodations for whites and negroes carried locally, was held valid so far as local passenger traffic was concerned, but the Court plainly intimated, as had also the State Court, that so far as the Act required the separation, or provision for separation, of interstate passengers, it was within the case of *Hall vs. DeCuir*, and void.¹ It could not, therefore, apply to trains which did not carry any local passengers, but when the company engaged in local transportation it must conform to all State regulations in regard thereto, though the necessity of so doing would indirectly increase the expense of carrying interstate passengers.

68. In like manner a law providing that all unoccupied upper berths should be closed at the request of the occupants of the lower berths would be valid as to all cars used for local as well as interstate traffic, but could not apply to

¹ *L. N. O. & T. R. R. vs. Miss.*, 133 U. S. 587 (1890).

cars used exclusively for interstate transportation, nor could an interstate passenger take advantage of its provision, for the State has no power to regulate his contract with the company.

Such laws, so enforced, in no way interfere with the carrier's freedom in making or carrying out contracts for interstate traffic. On the other hand, a law prohibiting a passenger from occupying a whole section when there was not plenty of room, would be void as to any one proposing to use that section for an interstate journey, although the car also carried passengers locally. For such a law would directly restrict the company's freedom in making interstate contracts, for it would be utterly unable to guarantee an interstate passenger a whole section, just as in *Hall vs. DeCuir*, the steamboat owner was unable to afford such a passenger accommodations free from negroes. Nor can the States make compliance with such laws a condition of the privilege of carrying on local transportation, for that would be to place a burden upon interstate commerce, not warranted by the police powers, and would be an attempt to do indirectly what they cannot do directly. But a law fixing the rates which shall be charged for local transportation is not void because, by cutting down the revenues of the roads from local business, it impairs their ability to make low rates for interstate traffic. Such an effect is not directly brought about by the enforcement of the local law, and is entirely too remote. This was one of the points decided in the Granger Cases, and it was there said that if it be found that the States in regulating

COMMERCE CLAUSE.

passed laws which incidentally affect interstate commerce, and the Court to interfere,

the same class, that is, those governmental activities which arise incidentally, of obligatory force upon the nation. Not being regulations of the activities and conduct of individuals or members of the community, but those engaged in interstate commerce. This was settled by the Court, for there is no difference between the laws which should be provided for interstate commerce, and one providing that the tracks and couplers of a specified class will make it more expedient for interstate commerce is quite as immaterial as it would be in prohibiting the erection of a building. Such a law was opposed for the purpose of putting up a frame building for interstate commerce. No law was void as laying a tax upon interstate commerce, because it does not lay a tax upon interstate commerce, but upon individual property. Unrestrained, would not be a law upon the community. So also the law of certain buildings to

70. In the matter of regulating the use of its highways, natural or artificial, the power of the State has always been conceded. The only contest has been as to what should be considered regulations of the highway as distinguished from regulations of commerce. For example, a State law making it a criminal offence to have intoxicating liquors in one's possession would be void as to one who was simply transporting those liquors on the highway to or from another State. On the other hand, it could not be contended that, if a State enacted a law requiring that all persons driving at night should carry lanterns, the law would be inapplicable to persons driving across the State boundaries. In the numerous bridge cases it has repeatedly been held that the power of the State to build bridges, dams, or locks across the rivers exclusively within its limits, is not taken away by any clause of the Constitution, and can only be qualified by the laws of Congress passed in pursuance of its power to regulate commerce.¹ Thus in *Escanaba vs. Chicago*,² it was decided that the State of Illinois could erect draw-bridges across the Chicago river, and regulate the length of time they should be kept open, and provide that at certain times they should not be open at all. And Judge Wallace decided in the United States Circuit Court that the law of New York compelling the telegraph companies within New York city to place their wires underground was a

¹ *Gilman vs. Phila.*, 3 Wall. 713 (1866); *Wilson vs. Black Bird Creek Co.*, 2 Pet 251 (1829).

² 107 U. S. 678 (1883).

legitimate exercise of the State's right to regulate its internal affairs, and was enforceable as to a telegraph company whose business was largely interstate.¹

And Mr. Justice Matthews, in *Smith vs. Alabama*,² speaking of the power of the State says: "The width of the gauge, the character of the grades, the mode of crossing the streams by culverts and bridges, the kinds of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns and cities, are all matters naturally and peculiarly within the provisions of the law, from the authority of which the modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the limits of the local law. They are not, *per se*, regulations of commerce." And if the State may regulate the speed of trains, it may also require the companies to equip their trains with such appliances for governing speed as it may think proper.

But it is said that all such regulations will cast a burden upon interstate commerce. That they will to some extent curtail the freedom of action of persons engaged in such business, and that they may compel those persons to make larger expenditures than they otherwise would, and may thus cut down their profits, is not denied. But

¹ *W. U. Tel. Co. vs. Mayor*, 2 I. C. R. 533 (1889).

² 124 U. S. 465 (1888).

such regulations do not cast any burden upon interstate commerce as such, but only upon the carrying on of certain operations, upon the conducting of which in a proper manner, depends the safety and good order of the community. Nor is the freedom of anyone to engage in interstate commerce restricted or curtailed, but only their conduct and the use of their property in situations in which the health, safety and good order of the community are involved. That a proper regard for objects of such vital importance to the people of the State may require the expenditure of more money to provide for their accomplishment, is, as we have seen, only the incidental effect of such requirements, and has no bearing upon the question of their validity, for the reduction of the profits is not the object aimed at, and the additional expenditure is not required of the interstate carrier, because the transportation is interstate, but because transportation of any kind involves the safety of others.

71. The Massachusetts Railroad Commission, speaking of the problem of automatic couplers, says: "It would seem, however, that all compulsory State legislation, prescribing the use of any one coupler, must be unconstitutional and void so far as it relates to interstate commerce, *for no State can direct the manner in which interstate commerce shall be conducted*; and so much of our commerce is interstate that only an insignificant fraction will remain subject to the restrictions of local legislation in this respect." Now undoubtedly no State can direct the manner in which interstate commerce shall be conducted, for that

is regulating commerce in the plainest sense of the term. But when that phrase is used to describe State legislation regulating the conduct of persons, irrespective of their particular business, it certainly cannot be said to be equivalent to regulating interstate commerce. For if a law forbidding or punishing reckless driving is, when applied to a man driving a wagon from another State, or loaded with interstate goods, a direction of the manner in which commerce shall be conducted, that is, a regulation of it, and void, then the people on the streets of our cities, or upon the highways of the State, are absolutely at the mercy of anyone hauling interstate goods, for he may rush at a mad pace through all the busiest thoroughfares, and not one of his victims can hold him answerable, for the only law which he has violated is void as to him. The statement of the commission that all regulations concerning automatic couplers must be comparatively useless unless applicable to interstate as well as State traffic, is also true of almost any other regulation of railroads. This very condition of affairs, instead of being a reason why the States should not possess the power to regulate all those instruments of commerce that come within their borders, is a conclusive reason why they should have that power. Otherwise, the preservation of the health and safety of their inhabitants, for which it is not only their right but their duty to provide, must, to a large extent, be prohibited to them.

72. That State statutes, of the kind under consideration, may, and frequently do, conflict, to the detriment

and embarrassment of interstate railway transportation, is but too true. But it does not follow that, because the different States may pass different and conflicting laws upon a subject within their jurisdiction, neither of them can exercise that jurisdiction. Arguments drawn from the possible conflict of State regulations have frequently been made use of for the purpose of determining whether a given law belonged to the particular class of regulations of interstate commerce which the States could pass in the absence of Congressional action. If the result of conflicting State regulations of that particular character would be the embarrassment and injury of interstate commerce, then, certainly, the Constitution never meant that the States should have power to pass such laws at all, and the silence of Congress can only be construed to mean that no legislation of that character should be made by the States. This was decided in *Railroad vs. Husen*,¹ and *Welton vs. Missouri*.² Hence it is apparent that when the law in question is not a regulation of commerce at all, the actual or possible effect upon interstate commerce, should conflicting laws be passed by other States, has nothing whatever to do with the question. For example, the power of the State to regulate the form and authentication of contracts cannot be influenced by the fact that other States may enact laws requiring a different form, or fuller proof, although commerce among the States may be affected and impeded. It is the *conflict* and not the laws

¹ 195 U. S. 465 (1878).

² 91 U. S. 275 (1876).

between which it occurs that hinders and impedes commerce, and no reflex action upon the laws themselves can arise from their opposition. The fact that an injurious conflict may arise from State laws *regulating commerce* is conclusive proof that the power to make regulations of that character is taken away from the States by the Constitution ; but the fact that such a conflict has arisen between State laws not in themselves regulations of commerce, nor amounting to such, is conclusive only of the appropriateness of the subject for Congressional regulation.

Moreover, it will be noticed, that in all the cases in which State laws have been declared void on the ground that a conflict injurious to commerce would or might result, if each State was allowed to pass such laws, it was the *possible* and not the *actual* existence of such a conflict which prevented the State from ever passing laws of this kind. In other words, if a State law will be void when it obstructs commerce, by conflicting with other State laws, it must be void *ab initio*, and not when the conflict first arises. Otherwise, which law would be void, the one which the first State had a right to pass because no conflict then existed, or the law of that State which, by passing a subsequent measure of a different character, caused the conflict ? If the first is void, then it is in the power of any State to repeal certain laws of all the other States. If the second one only is void, then one State may, by first legislating on this subject, shape and control the legislation of all States in the Union, because all the

others would be powerless to pass different laws, because such laws would be void, for to allow their validity would be to permit a conflict. If it is said that both laws would be void, then we reach the absurd conclusion that admittedly valid laws of all the States may be rendered null and void by a single law of a single State, though the law annulling them is itself void. The States would then resemble men employed in a powder mill ; the incautious or deliberate action of one may cause the destruction of all, including the one who brought it about. Whether, when all laws were thus repealed, they might begin over again until a new conflict arose, when all laws would be again annulled, and thus keep up the play, as in chess, until a checkmate is arrived at, when the board is cleared and a new game commenced, would be an interesting question.

73. This *reductio ad absurdum*, we think, conclusively shows that if State laws upon the subjects under consideration are good at all, they must continue to be good even when a conflict arises. Now the Supreme Court has held in *Smith vs. Alabama*, and *Nashville, etc., R. R. vs. Alabama*, that such laws are within the scope of State legislation. Therefore such laws are valid even though a conflict does arise. It is perfectly evident that the States may pass as irreconcilable laws in regard to the kind of engineers as in respect to any other part of the equipment of a railroad, and that such inharmonious laws may impede commerce. Yet in neither opinion does the Court even consider the question of a possible conflict.

Now if they thought that that question had anything to do with the validity of the law, they certainly would have examined it, as they have done in other cases, for we have shown that if a conflict will ever make a law void, that law cannot be passed at all. Therefore the silence of the Court on the question of a possible conflict shows that a conflict had nothing to do with the validity of the law, and that the decision could not have been different had the case presented an actual conflict, injurious to commerce. Hence we conclude that State laws which do not amount to regulations of commerce, but are merely legitimate exercises of the inherent powers reserved to the States, must be valid, until displaced by Congress.

74. It is true that a statute requiring, for example, all cars to be fitted with a kind of coupler which was not used outside of the State, would certainly impair, to some extent, the usefulness of those cars for interstate traffic, and the usefulness of cars owned elsewhere for interstate traffic in which that State was involved. But it does not follow that because this is the result the law which is responsible for it is necessarily void. To impair the usefulness of the facilities of the carrier for interstate commerce is neither the object nor the necessary result of such a law, but only its incidental effect. The law of Pennsylvania which authorized a bridge across the Schuylkill, and thus rendered useless a wharf formerly used for interstate commerce, was not, on that account, any less valid, because, since the law was not a *regulation* of such commerce, either in its object or in its reasonable or probable

effect, the fact that it did actually destroy such commerce was immaterial.¹ So, also, the law of Delaware, authorizing a dam across a navigable creek, was held valid, although the dam absolutely excluded interstate commerce from such a creek, because the subject which the law dealt with or regulated was not a commerce, but only the physical characteristics of the country in their relation to the health of the inhabitants.² And the law of Oregon providing for the erection of a bridge across an important navigable river was valid, although the bridge cut off communication from the sea, and thus rendered useless the facilities which the plaintiff had provided for interstate commerce.³ In these cases the laws were valid, although the structures authorized by them did seriously obstruct commerce, because the structures were authorized, not as obstructions to commerce, but for the purpose of carrying out objects within the legitimate scope of State legislation.

75. We conclude, therefore, that the State has power to regulate, in the minutest detail, the road-bed, rolling-stock, operation and management of all railroads within its limits. And when such regulations are legitimate ones for the preservation of the health, safety or welfare of the community, and do not amount to regulations of commerce, they apply to all railroads and railroad cars and engines which are used within the State, and such

¹ *Gilman vs. Philadelphia*, 3 Wall. 713 (1866).

² *Wilson vs. Black Bird Creek Co.*, 2 Pet. 251 (1829).

³ *Willamette Bridge Co. vs. Hatch*, 125 U. S. 1 (1888).

regulations are valid even though the subjects to be regulated are instruments of interstate or foreign commerce. For example, the State may regulate the kind of rails, switches, signals, etc., which shall be used in operating the railroads in the State. It may prohibit any car which is not provided with certain safety appliances from being run on any railroad in the State, even though the car may have come from another State, or be loaded with interstate goods. It may stop at the border any car which is not fitted with a required kind of coupler, or air brake, or contains a "deadly car stove," etc.

76. If disastrous and vexatious impediments and delays in the transportation of persons and merchandise between the States result, as they most probably will, from the passage and enforcement of such laws by different States, the remedy must be sought, not in the courts, but in the paramount power of Congress. That the railroads have hitherto enjoyed a comparative immunity from State regulations is no ground for claiming that immunity as a right; nor is the pre-eminent appropriateness of the subject for uniform regulation and control any reason why local and diverse regulation should be invalid. It is only a reason why State regulation should be most *inappropriate*, and action by Congress absolutely essential, because of that inappropriateness. But there being no clause of the Constitution which condemns State legislation because of its being unsuited to the subject-matter, and Congress not having been given an exclusive but only a paramount power to provide for the

health and safety of the community, whenever the subjects affecting it are connected with interstate commerce, there is no ground upon which such State laws, however inconvenient, can be declared unconstitutional or void. If, therefore, the States do enter upon a course of legislation of this kind, as some of them already have done, and it is found that such laws are an obstruction to interstate commerce, Congress must be appealed to to remove the inconvenience by repealing all such laws by enacting a single, uniform law of its own, providing in a much more efficient and satisfactory manner for the attainment of those objects which the diverse laws of the different States had hindered rather than advanced. Congress can remedy the evils of the present system by replacing it with a better one, but the courts, even were they so disposed, could do nothing but abolish what already exists, and would be powerless to provide a substitute. As well advocate a general conflagration to renovate a city, as to call upon the courts to relieve commerce by annulling all State laws.

PART III.

THE COMMERCE CLAUSE AS AFFECTING STATE
TAXATION OF RAILROADS.

CHAPTER VIII.

TAXATION OF RAILROAD GROSS RECEIPTS.

77. CLOSELY allied to the State's power to regulate the instrumentalities of interstate commerce is its power to tax them. The foundation of the first power, we have seen, rests upon the fact that corporations and individuals, whatever their business, owe certain duties to the community in which, and under whose protection, they carry on their operations. In return for this protection, and in fulfillment of their duty, as citizens, to contribute to the support of the State government, they may be called upon to pay taxes. Indeed, the power of the State to tax persons and property within its limits is fundamental, is, in fact, the most important of those powers possessed by the States before the Revolution, and not surrendered by them to the National government by the Constitution. But it results from the complex nature of our government, that powers which would otherwise be paramount in the States are, in their exercise, more or less restrained by those granted to the United States. Thus, in the great case of *Brown vs. Maryland*,¹ the precursor

¹ 12 Wh. 419 (1827).

of the "Original Package" Case, Chief Justice Marshall, speaking of the State's power to tax, said: "We admit this power to be sacred, but cannot admit that it may be used so as to obstruct the free exercise of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the State must have some limits."

And Mr. Justice Strong, in the important case of the State Freight Tax,¹ lays down the doctrine, that, "While upon the one hand, it is of the utmost importance that the States should possess the power to raise revenue for all the purposes of a State government, by any means and in any manner not inconsistent with the powers which the people of the States have conferred upon the general government, it is equally important that the domain of the latter should be preserved from invasion, and that no State legislation should be sustained which defeats the avowed purpose of the Federal Constitution,


¹ 15 Wall. 232 (1873).

or which assumes to regulate or control subjects committed by the Constitution exclusively to the regulation of Congress."

78. The difficulty in each case is, of course, to determine whether a State tax does in effect obstruct interstate commerce, or amount to a regulation thereof. And it is to be remembered in this connection, that where the subject is of such a nature as to admit of and require uniform regulation, the silence of Congress upon interstate commerce is an indication of its will that such commerce shall, for the present, remain free from State burdens or regulations, and is equivalent to an express enactment to that effect, and therefore State laws which assume to regulate or obstruct interstate commerce are void even in the absence of Congressional action.

79. In the case of State Freight Tax,¹ a law of the State of Pennsylvania which imposed a tax upon all transportation companies doing business in the State at so much for every ton of freight carried, came up for discussion. This, the Court held, was virtually a tax upon every ton of freight, of any description, carried upon the railroads within the State. In fact, the law authorized the transportation companies in some cases to add the tax to the freight rate. After remarking that it had repeatedly been held that the constitutionality, or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid, the Court points out that

¹ 15 Wall. 232 (1873).



the position of the carrier under this law was substantially that of one to whom public taxes are farmed out—who undertakes by contract to advance to the government a required revenue with power to collect a like amount from those on whom the tax is laid. The only difference is, that in one case the obligation to account to the government is voluntarily assumed, while in the other it is imposed upon the carrier by law. It was argued that this was a tax upon the franchise of the corporation proportioned to its use, that is, to the amount of business done; but the Court held that it was evident from the whole tenor of the law that the tax was laid upon the goods transported, and even if this were not the case, the tax was not according to the amount of business done, for it was a certain amount per ton carried, irrespective of the distance. This law was therefore held void, as was also, ten years later, a law of Texas, imposing a tax upon every message sent by a telegraph company doing business in the State.¹ In one case, the tax was abated on the interstate freight, and in the other, on the interstate messages.

80. In the case of the State Tax on Gross Receipts,² the Court decided, Mr. Justice Strong writing the opinion, that a State law imposing a tax upon the gross receipts of every transportation company incorporated by the State, was valid, because the fund which was taxed was property within the State which had, by becoming

¹ *Tel. Co. vs. Texas*, 105 U. S. 460 (1882).

² 15 Wall. 284 (1873).

incorporated with the general mass of the carrier's property, lost its distinctive character as receipts for transportation; and secondly, because the tax was a tax upon the franchise granted by the State, proportioned to the extent to which it was used, that is, the amount of business done under it, of which the gross receipts were a true measure. But this reasoning was altogether too unsatisfactory to long stand unchallenged, for it is apparent that a general tax upon gross receipts, partly derived from interstate commerce, must be graded upon that commerce, and therefore a burden upon that branch of the carrier's business, and therefore must be void. Indeed, Mr. Justice Bradley (who, though he concurred in the decision of the Gross Receipts case, does not seem to have had any delicacy in afterwards pointing out its absurdities), illustrates this very clearly in *Phila. S. S. Co. vs. Pennsylvania*:¹ "If the State cannot tax the transportation may it nevertheless tax the fares and freights received therefor? Where is the difference? Looking at the substance of things and not at mere forms it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company, 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

81. Because it was not so based, the Court had finally

¹ 122 U. S. 326 (1887).

to abandon it entirely. The first step was taken in *Fargo vs. Michigan*,¹ Mr. Justice Miller, who with Justices Field and Hunt had dissented in the earlier case, writing the opinion. A tax upon the gross receipts of all the car-loaning companies, etc., doing business within the State was held invalid because the business was interstate commerce. But as the funds sought to be taxed had never been within the State and the corporation was not a corporation of the State, neither of the grounds of the decision in the Gross Receipts case existed. It was not necessary, therefore, to discuss the authority of that case. But Mr. Justice Miller, after distinguishing the two cases, went on to say with much significance, and with evident reference to the facts of the earlier case: "The proposition that the States can, by way of taxation upon the business transacted within their limits, or upon the franchises of corporations they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defence to the allegation that the taxation was such an interference with the commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign Nations, the constitutional provisions cannot thereby be evaded; nor can the States, by granting franchises to corporations engaged in the business of transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or any other way."

¹ 121 U. S. 230 (1887).

This reasoning practically disposes of the second ground of the Gross Receipts case, and was affirmed by Mr. Justice Bradley in *Phila. S. S. Co. vs. Pennsylvania*.¹ He remarked that, "If intended as a tax on the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce,—it would be clearly unconstitutional." That case was very similar to the Gross Receipts case, only the fund taxed was derived entirely from interstate transportation, the company having no other business. The authority of the former decision was thus directly involved, and though it was not expressly overruled, yet both grounds upon which it was based were conclusively shown to be erroneous. The first ground was considered, and it was said, that though the State might tax persons and property within its limits, even though engaged in interstate commerce, yet it could not tax such property because of, or in proportion to such use, and that in this and the former case the tax was laid upon the funds, "not because they are money, or its value, but because they are received for transportation. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of six months, or a year, it is an exaction aimed at the commerce itself, and is a burden upon it and seriously affects it." The tax was accordingly held invalid.

¹ 122 U. S. 326 (1887).

82. We have made this rather minute investigation of the exact situation of the State Tax on Gross Receipts Case, because, though never expressly overruled, it has been practically deprived of all value as an authority, and this fact could only be established by somewhat copious extracts from the opinions in which it has been departed from. Indeed, in later cases, the Supreme Court seems almost to have ignored the existence of such a decision, for in two cases especially, *Ratterman vs. Western U. Tel. Co.*,¹ and *W. U. Co. vs. Alabama*.² State laws imposing taxes upon the gross receipts of telegraph companies have been held void so far as the receipts from interstate business is concerned. This is also the view taken by Judge McPherson, whose opinion was adopted by the Supreme Court of Pennsylvania,³ in the case of *Commonwealth vs. Delaware and Hudson R. R.*,⁴ in which a tax upon the gross receipts of a railroad company was held void as to the receipts from interstate transportation.

Closely in line with the above case is that of *Gloucester Ferry Co. vs. Pennsylvania*.⁵ In that case the State of Pennsylvania imposed a tax upon the entire capital stock of a New Jersey ferry company which was claimed to be doing business in this State, because it leased a wharf there and landed passengers at it. The tax was

¹ 127 U. S. 411 (1888).

² 132 U. S. 472 (1889).

³ 22 W. N. C. 525 (1888).

⁴ 21 W. N. C. 406 (1888).

⁵ 114 U. S. 196 (1885).

held void because the State cannot tax property not within its jurisdiction, and as the corporation was a foreign one, the only thing taxed was the privilege of landing and receiving passengers at a wharf, for the purpose of transferring them to another State, which business was interstate transportation and beyond the power of the State to tax.

83. In this connection we may also refer to two cases recently decided: *McCall vs. California*¹ and *Norfolk & Western R. R. vs. Pennsylvania*.² In the first case the State of California had imposed a license tax upon every railroad agency, and indicted one McCall for not paying for and taking out a license. He was the agent of the New York, Lake Erie and Western Railroad at San Francisco, and his business consisted in inducing people to buy their tickets over that line, he did not sell tickets himself, but merely accompanied travellers to the proper office for obtaining them. It was held that his business was that of soliciting contracts for interstate commerce, and therefore not taxable by the State, in accordance with the rule laid down in the *Drummer Cases*.³ In the second case the Norfolk and Western had an office in Pennsylvania, for which the State demanded a license tax of a quarter of a mill on every dollar of the capital stock of the company. It having appeared that the office was maintained for the purpose of solicit-

¹ 136 U. S. 104 (1890).

² 136 U. S. 114 (1890).

³ *Robbins vs. Shelby Tax Distc't.* 120 U. S. 489 (1887).

ing and procuring business for the "Great Southern Dispatch," a through line of which the railroad in question formed a part, it was held that a license tax therefor could not be exacted by the State. This was the rule laid down in *Leloup vs. Mobile*,¹ and more recently in *Crutcher vs. Commonwealth*,² those being cases of licenses demanded of telegraph and express companies for maintaining offices or doing business within the State.

84. The law, as laid down in these decisions, would therefore seem to be clear, that no direct tax can be laid upon gross receipts derived from interstate transportation. But unfortunately the Supreme Court, by a very recent decision, has opened a wide door for the evasion of this principle. In the case of *Maine vs. The Grand Trunk Railway Company of Canada*,³ the question was as to the validity of the statute of Maine which enacted that every railroad in the State should pay "*an annual excise tax for the privilege of exercising its franchises*," and it provided that the amount of such tax should be determined as follows: When the average gross transportation receipts shall not exceed \$2,250 per mile per annum, the tax shall be equal to one-quarter of 1 per cent. on the gross receipts, and when not exceeding \$3,000, one-half of 1 per cent. and so on. And when the railroad is operated as part of a line extending beyond the State, the transportation receipts to be taken as a basis of measurement shall be the average transportation receipts per mile on the whole

¹ 127 U. S. 640 (1888).

² 141 U. S. 47 (1891).

³ 142 U. S. 217 (1891).

line, multiplied by the number of miles within the State. This tax was held valid by a majority of five to four, Justices Bradley, Lamar, Harlan, and Brown dissenting. The opinion was written by Mr. Justice Field. He says: "The tax, for the collection of which this action was brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy there can be no doubt." And in answer to the ruling of the Court below that the reference in the statute to a certain portion of the gross receipts in determining the amount of the excise tax was, in effect, the imposition of a tax upon such receipts, and an interference with interstate commerce, the learned justice says that the reference to the receipts was only to ascertain the value of the business done in order to gauge the amount of the tax, and that he is unable to perceive in that any interference with interstate commerce. The case is said to be distinguished from that of *Philadelphia S. S. Co. vs. Pennsylvania*,¹ on the ground that, "in that case the tax was in terms upon the gross receipts;" but no attempt is made to reconcile the decision with that in *Norfolk and Western R. R. vs. Pennsylvania*.²

85. Whatever may be thought of this decision from a theoretical standpoint, and it is evident from the remarks quoted in this chapter that it is irreconcilable with the whole attitude of the Court for the last fifteen years, it

¹ 122 U. S. 326 (1887).

² 136 U. S. 114 (1890).

is quite certain that the practical results of the doctrine laid down in it will be most far-reaching. A State may now tax the gross receipts of transportation companies, whether derived from interstate transportation or not, provided the tax is called an "*excise or franchise tax*," and care is taken that it shall not be "imposed in terms upon the gross receipts," but made to vary directly with their amount. Of course the ultimate effect of such a tax upon interstate commerce is the same as if it were imposed upon the gross receipts directly, for the latter have no actual existence except on paper, and therefore cannot be taxed directly, and in either case the company must pay out of its treasury a sum whose amount varies with the amount of interstate business done.

What will be the future attitude of the Supreme Court on this question it is impossible to predict, for since the death of Mr. Justice Miller, *clarum et venerabile nomen*, there has again arisen in the deliberations of that tribunal that divergency of opinion which must always exist to a greater or less degree in every court of last resort, and which has characterized the Supreme Court at different periods of its history, but which men of great personal influence, like Marshall and Miller, have been able, while they lived, to hold in check. The death of Mr. Justice Bradley, whose last official act was his dissent in this case, and who, as is well known, was, when death overtook him, on the point of resigning, having become convinced that the difference of opinion between him and his fellow members was irreconcilable, has also added to the uncertainty

of the situation, for there is now no member of the Court whose opinions on interstate commerce matters are definitely known. It looks, indeed, as if they had about determined to abandon the position that gross receipts cannot be taxed, but if this is so, it would have been better had they said so fairly and squarely. They have chosen, instead, to imitate the courts of common law and equity, which, in ancient times, by introducing three words into conveyances to uses, nullified, as Lord Hardwicke said, a solemn Act of Parliament. The majority in this case, by the effect which they have seen fit to give to a few meaningless words in a statute, have weakened an important principle of constitutional law, and opened a fatal breach in that bulwark against State taxation of interstate commerce which the Court has hitherto always striven to maintain intact.¹

¹ See "A Method by which the States may now Tax Interstate Commerce," in *American Law Register and Review*, Vol. xxxi, 496.

CHAPTER IX.

TAXATION OF INCOME AND FIXED PROPERTY.

86. IN regard to taxing the *property* of corporations, it has been said in almost all the cases, "the corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such a tax care should be taken not to interfere with nor to hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principle so often announced that it may be said to be an axiom of our constitutional jurisprudence."¹

87. As we have seen, a tax does interfere with and hamper interstate commerce whenever corporations engaged in that business are discriminated against, in other words, whenever the business of carrying on interstate commerce forms the occasion of the tax, or that upon which the tax is in terms imposed. When either is true the tax is void. But when neither is the case, the tax is undoubtedly valid as to all corporations, including those engaged in interstate commerce, because the right of the State to tax persons and property within its limits is fundamental, and

¹ Phila. S. S. Co. vs. Penna., 122 U. S. 326 (1887).

the mere fact that such persons or property may be engaged in interstate commerce will not be sufficient to exempt them from bearing their share of the burden of State government. The Constitution only protects those engaged in interstate transportation to the extent that may be necessary to protect the transportation itself, that is, only from such burdens as fall upon the transportation, and not from such burdens as are laid upon the transporter as an inhabitant of the State, independently of his business.

88. Therefore all property within the jurisdiction of the State, whether belonging to corporations, domestic or foreign, and whether employed in interstate commerce or not, may be taxed by the State equally with other property within its limits. "Beyond all question," says Mr. Justice Clifford, in *Transportation Co. vs. Wheeling*,¹ "these authorities show that all subjects over which the sovereign power of a State extends are objects of taxation, the rule being that the sovereignty of the State extends to everything which exists by its own authority or is introduced by its permission, except those means which are employed by Congress to carry into execution the powers given by the people to the Federal government." It was accordingly held in that case that vessels may be taxed, as property, in their home ports, although used exclusively for interstate commerce. And in *Western U. T. Co. vs. Mass.*,² it was held that the property of a telegraph com-

¹ 99 U. S. 273 (1879).

² 125 U. S. 530 (1879).

pany, though mainly used for interstate commerce, may be taxed by the State. Therefore all railroad companies, domestic and foreign, may be taxed upon that portion of their capital stock that is represented by property within the State. Moreover, as the taxing power of the State extends to all objects over which the State may exercise sovereign power, the business which a foreign corporation carries on exclusively within the State may be taxed, because the power of the State over such business, as over that of a domestic corporation similarly engaged, is supreme. "If such corporation comes into Pennsylvania and carries on here the business of interstate commerce, its receipts therefrom may be taxed precisely as if it were a domestic corporation."¹ Foreign railroad corporations therefore, may be taxed, by a percentage of their gross receipts, or in any other way, for transportation of persons and merchandise wholly within the State. But property and business within the State are the only things for which a State can tax a foreign corporation.

89. Over domestic corporations, however, its powers are larger, for they are inhabitants and citizens of the State as much as individuals, and subject to like burdens and regulations. "Power to tax its citizens or subjects in some form is an attribute of every government, residing in it as a part of itself."² Domestic corporations, therefore, may be taxed not only for their property within the State, but in many other ways. A general in-

¹ *Commonwealth vs. D. & H. R. R.*, 21 W. N. C. 406 (1888).

² *Transportation Co. vs. Wheeling*, 99 U. S. 2731 (1879).

come tax, for example, falling upon all the citizens or corporations of the State is not void because part of the property from which the income is derived, is in another State, and subject to taxation there also. The power of the State over the income of its citizens, does not arise from any control of the property producing the income, but from its jurisdiction over the person to whom the income belongs. Therefore, although the State cannot tax the property producing the income, because it is not within its jurisdiction, it may, nevertheless, compel the recipient of that income, who is within its jurisdiction, to pay to it a portion of that income whenever it comes into his possession.

But of course the tax cannot be laid in such a manner as to become a specific burden upon interstate commerce, and for this reason a direct tax on gross receipts is void as to that part received for interstate transportation, even in the case of a domestic corporation, because such a tax is a regulation of interstate commerce.

But a general tax upon the net income of persons or corporations within the State is not open to the same objection, for it is in no sense a regulation of the business of the person or corporation compelled to pay it. It is a tribute demanded of them, not in proportion to the mere amount of their business, but in proportion to the skill, energy and industry with which they conduct that business, as shown in the net return which they annually receive from it, and which may very well serve as a measure of their ability to contribute to the support of the

government. Were the tax solely upon those engaged in interstate commerce, or upon them in a special way, then it would be void as a regulation of such commerce, but the regulation would not be in the tax, but in the fact that those engaged in such commerce were separated into a distinct class, and made subject to a different set of rules, from those engaged in similar pursuits, and were thus specifically regulated. True, such a tax may affect a person engaged in interstate commerce, and thus, indirectly, the commerce itself, but so will a law requiring all citizens to serve on juries, assist the sheriff, etc., or perform any of the other manifold duties and services which the State requires of her citizens. The framers of the Constitution never intended that persons engaged in interstate commerce should, for that reason, be absolved from performance of these duties. All that was meant by the constitutional provision was that such persons should be protected from all State burdens imposed upon them on account of their particular employment. It was never intended that they should not be called upon to support the State government according to their ability, that is, the amount of property of all kinds which they possess, although that very ability arose from their having made money in business, and that business was interstate commerce. No one would contend that property should escape taxation on the ground that it was purchased with money made in interstate commerce, and if the State's claim cannot be defeated after the money is invested, surely it cannot be before.

90. The difference between tax on gross receipts and a tax on net income is especially manifest in the case of railroad companies. The former, whenever it falls upon receipts derived from interstate business, must necessarily regulate such business, because the tax depends entirely and directly upon the amount of such business, and is irrespective of its profitableness or otherwise. Indeed, it would not be hard to demonstrate that such a tax is, in the majority of cases, a distinct and substantial drawback to engaging in interstate transportation, for the gross receipts from such transportation, the distances being greater may exceed those from internal transportation, but the net receipts, on account of the increased expenses and much sharper competition on through lines, may be, and usually are, much less than those from local business. Therefore, in all cases, it is the interstate business which swells the tax, but which, in most cases, diminishes the fund to meet it. The operation of a tax on net receipts is, however, exactly the reverse. The amount which must be paid, being dependent upon the final result of operating the entire system, it is manifest that any part of the system upon which the profits are below the average of the other parts must serve to reduce, instead of increasing, the amount of the tax, and this independently of the relative size and importance of that part.

91. It may happen that the property producing the income which is taxed, is itself taxed in another State. But there is nothing peculiar or unjust in this, for if a man receives the benefits of government in two different

States, he must contribute to the support of both of those governments. And in the case of a railroad, for example, the State, in which local business is carried on, may undoubtedly tax the company for such commerce, because it is under its control, although the profits derived from the whole business of the company, including this part, may be taxed in the State in which the company has its domicile and of which it is an inhabitant.¹

92. Certain limitations of the State's power of taxation arise in the case of a railroad company chartered by Congress. They depend upon the fact that no State can, in any way, hamper, impede or interfere with the means employed by Congress, to carry out its delegated powers.² But it was said in *Railroad Company vs. Peniston*,³ that the "exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the determination of the question whether the tax does, in truth, deprive them of the power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power." And it was held in that case that a tax upon the property of railroad companies, chartered by Congress, had no such necessary effect, but still left them free to discharge the duties which they had undertaken to perform. It was said, however, that a tax upon their operations would be a direct obstruction to

¹ *Coe vs. Errol*, 116 U. S. 517 (1886).

² *McCullough vs. Md.*, 4 Wh. 316 (1819).

³ 18 Wall. 5 (1873).

the exercise of Federal powers. As such a tax would also be void as a regulation of interstate commerce, the point is not of much importance. A tax on their net incomes, being substantially a tax upon property, would be valid. A tax upon their operations in the way of local business, which is not a purpose for which Congress could charter them, would also be valid. But a tax upon their franchises was held void in *California vs. Pacific R. R. Co.*,¹ because the franchise was the very power conferred, and it would be almost absurd to hold that a power given to a person or a corporation by the United States may be subjected to State taxation.

¹ 127 U. S. 1 (1883).

CHAPTER X.

TAXATION OF ROLLING STOCK.

93. A VERY interesting and difficult question, of vital importance to interstate commerce, is the situs of the rolling stock of a railroad, for purposes of taxation. The ordinary rule is that intangible personal property is taxable only in the domicile of the owner; but tangible personal property is taxable wherever it is found. But such a rule cannot be rigorously applied to the case of railroad cars, for interstate commerce could not be carried on if every car was taxable for its full value in each State through which it passes in an interstate journey, or if the company over whose road it is hauled was similarly taxable. Many cars pass through a great many States in the course of a single year, and if their movements can be burdened in this manner, they must become very unprofitable investments. At the same time it is manifest that the State is bound to protect all cars within its limits, and is liable to some one for any damage which may result from neglect to provide such protection. This being the case, the State should certainly have the power to tax them in some way, for, as Chief Justice Paxson, of the Supreme Court of Pennsylvania, in *Commonwealth vs. American Dredging Co.*,¹ says: "Legal protection and

¹ 122 Pa. St. 386-391 (1888).

taxation are reciprocal, so that such personal property and effects of a corporeal nature, or that may be handled and moved, as receive the protection of the law are liable to be taxed by the law when thus protected. Goods and chattels, horses and cattle, and other movable property of a tangible nature, are liable to taxation in the jurisdiction of the State wherein the same are, and are ordinarily kept, irrespective of the residence or domicile of the owner." The property in question consisted of dredges, scows, etc., never coming within the domicile of the corporation owning them. Speaking of this property, the learned Judge continues: "From the nature of the business, it is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here (the domicile of the owner), it escapes altogether." It was accordingly held that they were taxable in the domicile of the owner, in the absence of anything to show that they were so permanently located in another State as to be taxable there.

94. Now it is very difficult to determine whether the rolling stock of a railroad is or is not permanently located in a State. Of some kinds of rolling stock it is approximately true that it is so located, but of others it is not true at all. Of the first class are cars composing trains like the Chicago Limited on the Pennsylvania, and the "Royal Blue Line" on the Baltimore and Ohio. Both of these trains run through five States every twenty-four hours, and the cars are therefore in each of these States

for a portion of every day in the year. This being the case, it would seem that each State should have the right to tax them, in some way, as personal property within its limits. Of course they cannot be taxed on their full value in each of those States, because such a course would render interstate commerce impossible. Their full value is distributed, as it were, among all the States through which they pass on their regular run. As to such cars the most convenient method is probably that employed in Iowa, where the railroad companies are taxed for all sleeping and dining cars used, but not owned by them, but only to the extent to which they exist as property within the State, that is, upon a proportion of their value equal to the proportion which their mileage within the State bears to their total mileage.

95. Mr. Justice Brewer, while judge of the United States Circuit Court for Iowa, held this law valid in the case of *Pullman Co. vs. Twombly*.¹ The learned judge remarked that in the absence of any legislation by Congress, similar to that in regard to vessels, fixing the "home port" or situs of personal property engaged in interstate commerce, the most convenient rule must govern. This was not the case of cars owned in other States and only making single trips to the State of Iowa, but of cars which were found—and found continuously—in the State of Iowa, and which consequently acquired a situs there for taxation. If this were not so, and the cars could only be taxed in the domicile of the owner, then that domicile

¹ 29 F. R. 658.

might not be in any of the States in which the cars were used—might even be in a foreign country—and yet each of those States would be bound to afford the cars protection. The conclusions of the learned judge were as follows: “(1). That property is not exempt from liability to an equal and uniform tax by the fact that it is used either particularly or exclusively for interstate commerce; (2). That vehicles of transportation used continuously upon a single run acquire a situs, for purposes of taxation, independent and irrespective of the domicile of the owner; (3). Such situs is not destroyed by the fact that the owner, owning many vehicles of like character, and having lines in various parts of the United States, transfers from time to time, such vehicles from one line to another, provided a constant and continuous use of such vehicle is preserved upon the single run; (4). Where such vehicles are used upon a run extending through two or more States, there is a situs for taxation in each State to a fair proportion of the value of the property so used.”

96. There has been no decision of the Supreme Court in this case, but in *Pullman's Palace Car Co. vs. Hayward*,¹ that Court upheld the validity of a substantially similar law of Kansas. That case was decided at the same time with *Pullman's Palace Car Co. vs. Pennsylvania*,² in which a slightly different method of taxing such cars was also held valid. Instead of taxing railroad companies that

¹ 141 U. S. 36 (1891).

² 141 U. S. 18 (1891). See note on this case, by the author, in 30 Am. Law Reg. p. 432.

used the cars, Pennsylvania taxed the capital stock of the Pullman Company, taking as a basis of assessment such proportion of its capital stock as the number of miles its cars were run within the State bore to the whole number of miles its cars were run. This statute, in other words, proceeded upon the theory that for the purpose of taxation, the capital stock of the company was divided among the several States in proportion to the car mileage in each.

The Supreme Court sustained the validity of the tax by a majority of five to three. The Court, having remarked at the outset that it was settled law that a tax upon the capital stock of a company was a tax upon its property and assets, dealt with the tax in question solely as a tax upon the cars themselves as personal property found within the limits of the State. Although the particular cars used were not always the same, yet the company had at all times substantially the same number of cars within the State, and constantly and continuously used there a portion of its property. Had the cars run back and forth within the State, without crossing the boundary, there would have been no doubt as to the State's right to tax them, and this right was not taken away by the fact that they frequently went beyond the limits of the State. The convenience and justice of the method employed by Pennsylvania were obvious, and if adopted by all the States would result in the entire capital of the company being taxed in every State according to the amount invested therein. The opposite proposition, namely, that

when cars are in Pennsylvania every day in the year, and in New York every night, both States are deprived of the power to tax them, is not such as commends itself to the common sense of a practical age.

The law of which this case establishes the validity will undoubtedly be copied by other States, and the result will be that successive portions of the capital stock of the Pullman Company will be taxed by the various States in which its cars are run, until the whole of its capital stock is taxed in this way. It will then be paying taxes in each State in exact proportion to its property therein, which, is but just and proper. It does not appear in the case, whether the Pullman Company was taxed on its entire capital stock by the State by which it was incorporated, and it is not material, for the fact that it was so taxed could not affect the validity of the law in question. From considerations of comity and justice the States generally only tax their own corporations upon such portion of their capital only as is actually invested in property within the State, but this is not because they lack the power to tax them to any greater extent. If the citizen of one State sends his property into another State, he may be taxed for it not only by the State in which it actually is, but also by the State of his domicile, as a part of his general estate attached to his person. This is a burden and obligation incident to the ownership of property and arises naturally from the position its owner has assumed. As a citizen he owes certain duties to his own State, of the extent of which his entire prop-

erty, wherever situated, may well form the measure. And as his property in other States receives protection therefrom, and the benefits of their laws, he may be called upon to pay taxes therein to the extent of the protection afforded.

97. Of course the State can only impose such a tax as a property tax, for when the State of Tennessee declared that running sleeping cars not owned by the railroad using them should be considered a privilege for which the railroad company must pay a tax of fifty dollars a year, the Supreme Court of the United States held that the tax was not a property tax, but simply a condition upon which railroads were allowed to carry on that branch of commerce, and was therefore void as to interstate commerce conducted in this manner.¹

98. How far either of the methods of taxation above described would be applicable to freight cars is doubtful. As to certain classes of freight cars, such as those employed in the coal, oil, cattle and grain traffic, which have almost as regular runs as passenger cars, the Iowa method might be used with advantage, while as to private cars, refrigerator or stock the Pennsylvania method would be applicable. But as to cars used for miscellaneous freight it would not seem possible to employ either method, because such cars do not have any regular runs, which is the basis of the Iowa method, and to apply the Pennsylvania method would necessitate a detailed report

¹ *Pickard vs. Pullman Co.*, 117 U. S. 34 (1886); *Tennessee vs. Pullman Co.*, 117 U. S. 51 (1886).

from every railroad in the country of the number of miles its cars have run within and without the State. If, however, it is practicable to obtain such reports the Pennsylvania method could be used.

99. In connection with this question we may quote from an interesting dictum of Mr. Justice Matthews in *Marye vs. B. & O. R.*¹ In that case the State of Virginia had levied a tax upon certain rolling stock belonging to the B. & O. Railroad Company, a Maryland corporation, which was found within the State in constant use upon certain railroads which were leased by that Company. Those roads did not have any rolling-stock of their own, but were operated entirely by the cars and engines in question. It was held that there was no law of Virginia which imposed a tax upon the rolling stock of a non-resident company, and that, of course, disposed of the case, but Mr. Justice Matthews went on to say, "But it is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property, used and found within its territorial limits, if, and whenever it may chose, by appropriate legislation to exert its authority over the subject." And after adverting to the fact that the specific items of such property were constantly changing, the learned Judge continues: "In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of

¹ 127 U. S. 117 (1888).

course the lawfulness of a tax upon vehicles of transportation might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid. No question on that account arises in this case." This dictum is cited with approval in *Pullman Co. vs. Pennsylvania*,¹ where Mr. Justice Gray speaks of it as "the unanimous judgment of the Court."

100. The foregoing suggestions may involve some rather novel ideas in regard to taxation, but the subject itself is a novel one, and the ordinary rules are entirely insufficient for the satisfactory solution of the problem. That problem is the one which the Court has frequently had to grapple with in dealing with the whole subject of constitutional law, namely, to draw a line between two extremes. It is necessary, on the one hand, to guard against exposing interstate commerce to vexatious and burdensome State regulations, but on the other hand, care must be taken lest the States be deprived of all power to regulate or tax persons and property within their limits. As long as our system of State and National governments continues the field must be portioned out between the two sovereignties, and neither should be allowed to encroach upon the jurisdiction of the other.

The difficulty we have experienced in dealing with the question of taxation of rolling stock shows that the sub-

¹ 141 U. S. 18 (1891).

ject is an appropriate one for Congressional regulation. If Congress should provide a "home port" for railroad cars, as it has done for vessels, that would give them a definite situs for taxation, and they would then be exempt elsewhere, as registered vessels are.¹ Unquestionably Congress has power to make such a provision, if it is one which the commercial interests of the country require, and it would seem, in view of the probable further complication of the subject by continued State action, that some legislation of the kind is imperatively demanded.

¹ *Hays vs. S. S. Co.*, 17 How. 596 (1855).

CONCLUSION.

101. It is very evident, from the investigation we have made, that the State legislatures, though their powers are by no means unlimited, are capable of inflicting very great injury upon the railroads of the country, especially if they exercise those powers unjustly or unwisely. Their power to regulate rates and fares, for example, only extends to local business, but even in that restricted field they may do incalculable harm by practically cutting off the most lucrative sources of revenue. And as to laws of another character, such as are generally called "Police Regulations," the opportunities for mischief are even greater, because the viciousness of such legislation consists not so much in the substance of the individual laws, as in the confusion which arises on account of the want of harmony between the systems of the different States. This confusion must continue to exist as long as various legislative bodies are permitted to legislate independently upon the same subject matter, and cannot fail to prove most embarrassing to the railroads.

102. Whence, therefore, may we look for relief from such oppressive legislation? The courts, which in so many instances have proved invaluable for the purpose of counteracting the evil effects of unwise legislation, cannot help us in this case, for there can be no doubt of

the authority of the States to enact laws of this character. We must therefore look elsewhere, and unless we have exaggerated the powers of Congress over commerce, it is to that body that we must resort for remedial legislation. It was, indeed, expressly for the purpose of providing a remedy for the very evil described that the Commerce Clause was inserted in the Constitution, and **the intent** of the framers of that instrument cannot be effectually carried out, and **the efficiency** of the government maintained, unless the powers conferred by this clause, though technically confined to commerce with foreign Nations and among the several States, be acknowledged to extend to every species of commerce and all the means by which it is carried on, thus bringing within the scope of Congressional legislation every possible regulation of railroads. And inasmuch as our government was established with the distinct understanding that the Constitution, and the laws of the United States made in pursuance thereof, are the supreme law of the land, and binding upon the judges in every State, anything in the Constitution or laws of any State to the contrary notwithstanding,¹ it is clear that the power of Congress over the whole subject of commerce, and consequently the control of the railroads, must necessarily be supreme, and that upon the passage of a National law upon these subjects all State laws, in so far as they conflict therewith, instantly become inoperative and void. In other words, there exists in Congress a power to supervise and control

¹ Const. Act VI, 2.

the entire railroad legislation of the country, which is ~~moreover~~ not a mere negative or veto power, but an active and ~~constructive~~ one.

103. The importance of this fact cannot be exaggerated, nor too soon brought to public notice. The first intimation the country has had of the existence of such a prerogative in Congress was the passage of the "Wilson Act," in pursuance of a hint thrown out in the "Original Package" Case,¹ and the emphatic manner in which the Supreme Court subsequently sustained the validity of that law.² It is particularly appropriate that this discovery, for such it has seemed to most people, should have been made at this time, when every day some fact comes to light, which shows how rapidly the railroads are becoming National in their interests and importance, and, therefore, no longer suitable for local control, and when consolidations are constantly turning local and independent roads into parts of great transcontinental, interstate, or even international systems. For the regulation of these great systems, which seem destined to ultimately absorb every road in the country, no power could have been devised so appropriate as the prerogative of Congress above described.

104. Thanks to the liberality and foresight of our forefathers, who, instead of loading the Constitution with a mass of embarrassing detail, left so much to the discretion of the Court, and thanks also to the wise and statesman-

¹ *Leisy vs. Hardin*, 135 U. S. 100 (1890).

² *In re Rahrer*, 140 U. S. 545 (1891).

like manner in which successive jurists have construed that instrument,—justifying in the highest degree the great confidence reposed in them—the Constitution, in this, as in all other emergencies, has proved amply sufficient to meet the necessities of the case. The responsibility for the skillful and beneficent exercise of the great powers which the Constitution confers must now rest upon Congress, to which alone we must look for the solution of the “Railroad Problem,” and when once it enters upon a consideration of this subject, the proceedings of that body cannot be too closely watched by its constituents, and by those whose property is at stake.

APPENDIX.

THE PRESENT STATUS OF THE INTERSTATE COMMERCE COMMISSION.

105. Two Circuit Courts of the United States have now passed upon the question as to the effect which should be given to the report and findings of fact of the Commission, when resort is had to the Court to enforce obedience to the Commission's order. Judge Jackson, in *Kentucky, etc., Bridge Co. vs. Louisville, etc., R. R. Co.*,¹ and Judge Acheson in *Interstate Commerce Commission vs. Lehigh Valley R. R. Co.*,² concur in holding that the report and findings of fact should be *prima facie* evidence only, and that it is the duty of the Court to form an independent judgment, after hearing, not only the evidence contained in the report, but any additional testimony that either party might produce. The language of the Act is very clear to this effect, and these decisions have placed its construction beyond possibility of question.

106. If this be the state of the law, one may perhaps be permitted to ask of what practical utility is the Com-

¹ 37 Fed. Rep. 567.

² 3 I. C. R. 796.

mission? Judge Jackson says: "In respect to interstate commerce matters covered by the law, the Commission may be regarded as the general referee of each and every Circuit Court of the United States upon which the jurisdiction is conferred of enforcing the rights, duties and obligations imposed under the Act." But this can only be so to a very qualified extent, for the same learned Judge refused to give to the findings of the Commission the effect of those of a referee, for he sent the whole case to another referee, who came to an opposite conclusion, which the Court confirmed. Had the complainant in that case been able to proceed in the Circuit Court in the first instance, it would have been saved the expense of the investigation before the Commission (in which each party pays his own costs), which was really of no advantage to it. Indeed, under the present state of the law, an investigation by the Commission is a mockery and a sham, and fails to serve any useful purpose. Under the present method, in order to obtain redress, a complainant must prove his case successively in two separate tribunals, and if he loses in either, relief is denied him. And even if he wins before the Commission, he has gained a very slight advantage; for although a favorable report will be *prima facie* evidence for him in the Circuit Court, yet, owing to several circumstances, this does not amount to much. The respondent is not compelled to show his hand before the Commission, and may keep back testimony which, when produced for the first time in the Court, may rebut the *prima facie* effect of the report, and throw the burden

again upon the complainant. Then, the length of time which is likely to elapse (in the Coxe Case nearly three years) between the hearing before the Commission and that in the Court, is of itself sufficient to discredit a report, especially upon such a subject as the reasonableness of rates. Nor can a judge who, by the law, is expressly required to form an independent judgment, be expected to give very great weight to the conclusions which other men have arrived at from an investigation of the same questions into which it is his duty to inquire, especially if he has no particular reason to believe that those men had any better opportunities for eliciting the truth, or were any better fitted for forming an opinion.

107. The above views, if correct, would seem to lead to the conclusion that the findings of fact of the Commission should be given the efficacy of a judgment, or the investigation by the Commission abolished, and an original proceeding before the Circuit Court, or some special tribunal, substituted. The Commission have asked, in their fourth annual report, that their findings should be accorded the same weight as the report of a master in equity, but this request and the remarks which they make in the same connection show that the functions of a master are not very clearly understood by them, for proceedings never originate before a master, but in the Court to which he makes his report. To do as they request would not bring us any nearer a solution of the problem, for it would not change in any important particular the attitude of the Courts towards the Commission. On the other hand,

equal to if not superior to that exhibited by the Commission. Nevertheless certain disadvantages would result from throwing the whole matter into the Circuit Courts. The evident reason for the establishment of a permanent commission, with jurisdiction over the whole subject of interstate commerce, was the hope that by that means consistency and uniformity of policy would result, which it was thought could not be obtained in any other way. True, the attainment of this object has been to a very great extent prevented by the frequent changes in the *personnel* of the Commission (the average official life of the commissioners has been only two and a half years), and will be entirely frustrated if the present method of trying the cases *de novo* in the Circuit Courts is to continue, but both these obstacles may in time be removed. But to transfer this jurisdiction to the Circuit Courts would make uniformity almost impossible. Just as the Circuit Courts now frequently come to conclusions quite different from those reached by the Commission, after an investigation of the very same facts, so the various Circuit Courts would be likely to differ from each other; for, in deciding matters of fact, precedent counts for little, and on questions depending almost entirely on judgment, courts are always apt to differ. Nor, for the same reason, would an appeal to a higher tribunal, apart from the difficulty which would attend such a proceeding in matters of this kind, be of much avail in securing uniformity.

110. It would seem, therefore, that the efficient administration of the Act to Regulate Commerce requires the

establishment of one court, whose members shall be learned in the law and hold their offices during good behavior, and which shall have power to hear and determine as a permanent, special jury, all matters of fact arising under the Act. What is needed is one tribunal, in which the evidence shall be produced once and for all, and which shall have authority to pass finally upon matters of fact, and possibly also upon mixed matters of fact and law. To this end the findings of the Court might be given the effect of a verdict, which could be enforced in the regular judicial tribunals, to whose decision should be left pure questions of law, such as the admission of evidence, the construction of the Act, the authority of the special tribunal, etc. The advantage of such a system would lie in the fact that we would then have a body which would be more or less bound by its own precedents, and thus we would have a guarantee that its determinations would be marked, as far as possible, by a consistent and uniform policy.

111. This could all be accomplished without conferring upon the Commission any such dangerous power as that of enforcing their own decrees. To be invested with a power like that, the Commission would have to be turned into a regularly organized United States Court, but it would be a court whose powers would far exceed those of any judicial tribunal ever erected in this country. Moreover, the proposition is contrary to the fundamental ideas of our government, in which the legislative and executive functions are rigidly separated, and to one of the most

important principles of our system of law, that the function of deciding matters of law should not be imposed upon the same men who decide questions of fact. Mr. Joseph Nimmo, Jr., in a very forcible argument made before the Senate Committee on Interstate Commerce, against conferring judicial powers upon the Commission, says: "The efficient administration of justice in our Federal Courts requires constant familiarity, with judicial procedure and with the relations of the judiciary to the legislative and executive branches of our government, as well as with questions of governmental policy. Such knowledge and functional efficiency can be found ordinarily only with judges upon the bench, devoting their lives to judicial study and judicial administration. It appears to me too absurd for serious consideration to suppose that a body of Interstate Commissions, whose time and intellectual powers are absorbed in the consideration of the multifarious economic commercial, and finely technical questions involved in the determination of what in practice constitute unreasonable rates and unjustly discriminating rates, should pretend to be able to give sufficient attention to the law and to judicial functions to be competent to sit as Federal judges, *especially upon matters which they had already investigated as specialists*. The judicial habit of thought and clear views of judicial procedure do not ordinarily dwell with men whose minds are absorbed in the contemplation of the competitive struggles of life. Such procedure would be a degradation of the judicial function, besides constituting a baneful perversion of our form of government."

The truth of these observations is evident, and the actions of the Commission also show it. In their fourth annual report they say : "The Commission created by law for the regulation of railway transportation do not deal with questions of classification or of rates as questions of law, but as being what they necessarily are—questions of discretion and of sound judgment."

112. And this is in fact the manner in which they deal with all questions which come before them. Take for example, their decision that "party rates" were not authorized by the provision allowing companies to issue "commutation" tickets. This was on the ground that by the signification ordinarily attached to the latter term by railroad and commercial men, it did not include party rates. The Circuit Court, however, dealt with the question as a purely legal question should be dealt with, refusing to be bound by the construction which a certain portion of the community might have given to it, and held that Congress must be considered to have used the word in its ordinary sense, and that as such it did include party rates. It would be well to pause before increasing the powers or widening the scope of a non-judicial body which professes to decide questions of law by other than legal standards and by other methods than those of the regularly constituted judicial tribunals.

INDEX.

(THE REFERENCES ARE TO SECTIONS.)

	SECTION.
ACCOMMODATIONS	
Furnished by common carrier—power of State over	64-68
AGENCY,	
Exemption from State tax of Federal	92
Railroad, State power to demand license for	83
AIR BRAKES,	
Power of Congress to compel use of	21, 22
Power of State to compel use of	69, 75
ARTICLE,	
When interstate commerce in, commences	8, 49
AUTOMATIC COUPLERS. (See <i>Couplers</i> .)	
BILL OF LADING,	
As test of character of transportation	8
BRADLEY, JUSTICE,	
On gross receipts tax	80, 81, 84
On power of Congress to construct railroads	29
On supremacy of Federal government	32
BREWER, JUDGE,	
On taxation of rolling-stock	95
CANALS,	
Power of Congress to regulate construction of	18
Power of Congress to regulate commerce on	19
CAPITAL STOCK	
Of railroad company—State tax on	82, 83
CARS,	
Analogy of, to vessels	20, 21
Power of Congress to regulate construction of	20
Power of State to regulate construction of	70, 71, 75
When under power of Congress	21, 22
Uniform equipment of	21, 71
(See <i>Rolling-stock</i> .)	

CAR STOVE,	SECTION.
Power of Congress to prohibit use of	22
Power of State to prohibit use of	75
CHARGES. (See <i>Rates and Fares.</i>)	
CIRCUIT COURTS,	
Attitude of, towards Interstate Commerce Commission	106, 107
Relation of, to Interstate Commerce Act	110
COLORED PERSONS,	
State statutes prohibiting discrimination against	60, 67
COMMERCE,	
Burden upon, is regulation of	44
Confided by the Constitution to the care of Congress	19
Internal, by means of interstate transportation	51
Internal, when Congress may regulate	10, 14
Knowledge of, at time of Revolution	15
Meaning of the word	1, 5, 23, 51
Power of Congress to prescribe manner of carrying on	23, 35
Which Congress may regulate	10, 14
Which State may regulate	50-54
(See <i>Interstate Commerce.</i>)	
COMMERCE CLAUSE,	
Construction of	1-5
Effect of, upon State legislation	42
Effect of, upon State taxing power	77
Reasons for the adoption of	10
COMMISSION. (See <i>Interstate Commerce Commission.</i>)	
(See <i>Railroad Commission.</i>)	
COMMON CARRIER,	
Power of legislatures to regulate charges of	34, 36-41
Power of State to regulate conduct of	58
What law defines obligations of	57
COMMON LAW,	
Power of State to change	58
COMPENSATION	
Not a condition of regulation	35
CONFLICT	
Between different State laws—effect of	72, 73
Between different State laws—remedy for	76
Between State and Federal laws—effect of	55, 102

CONGRESS,	SECTION.
Railroad chartered by, powers of	30, 32
Railroad chartered by, power of State to obstruct	30, 32
Railroad chartered by, power of State to tax	92
Railroads subject to control of	25
Silence of, meaning of	78
Supremacy of	32
Supremacy of laws of	55, 102
Test of railroad subject to control of	26
(See <i>Power of Congress.</i>)	
CONSTRUCTION OF RAILROAD,	
Power of Congress to authorize	29-32
Power of Congress to regulate	26
Power of State to regulate	70
CONTRACT OF SHIPMENT	
As test of character of transportation	8, 49, 50
CONTRACT OF TRANSPORTATION,	
State laws regulating	60-63
COOLEY, JUDGE,	
On railroad system of U. S.	25
CORPORATION	
Chartered by Congress, exemption of from State taxation	92
Chartered by Congress—rights and powers of	29-32
Congress may charter	29, 32
Congress may give right of eminent domain to	31
Domestic, power of State to tax	89
Engaged in interstate commerce cannot be obstructed by State	29-32
Engaged in interstate commerce—power of State over	56
Engaged in interstate commerce is under protection of commerce clause	32
Foreign—power of State to tax	88
Power of State to tax	77
Power of State to tax capital stock of	82, 83
Power of State to tax franchise of	81, 84, 85, 92
Power of State to tax income of	89
Power of State to tax property of	86-88
Taxation of personal property of	93

COUPLERS, AUTOMATIC,	SECTION.
Power of Congress to compel use of	21, 22
Power of State to compel use of	69, 71, 75
CRIMES	
Against interstate commerce—punishment of	24
CUMBERLAND ROAD, THE,	
Congressional legislation concerning	29
DESTINATION,	
As determining character of transportation	62, 94
DISCRIMINATION*	
Against colored persons—State laws prohibiting	60, 67
Against interstate commerce—tax making	87
In interstate rates—State laws against	46, 60
EMINENT DOMAIN,	
Power of Congress to invest corporation with right of	31
EXCISE TAX. (See <i>Franchise</i> .)	
FEDERAL SYSTEM	
In relation to the regulation of commerce	13, 50
FIELD, JUSTICE,	
On franchise tax	84
On State police regulations	56, 84
FIFTH AMENDMENT,	
Bearing of, on Commerce Clause	33
FOURTEENTH AMENDMENT,	
Construction of	34
Relation of, to fifth amendment	34
FRANCHISE	
Of corporations—State power to tax	81, 84, 85
Conferred by Congress—power of State to tax	92
FREIGHT CARS,	
Taxation of	98-100
FULLER, CHIEF JUSTICE,	
On effect of Commerce Clause on State legislation	42

	SECTION.
GRAIN ELEVATORS,	
Power of State to regulate charges of	34
GROSS RECEIPTS	
From internal commerce—tax on	89
Of transportation companies—tax on	80-85
Of telegraph companies—tax on	82
Tax on, contrasted with income tax	90
HAMMOND, JUDGE,	
On regulation of transportation charges	34
On State laws regulating commerce	45
HIGH SEAS,	
Power of Congress over	18
HIGHWAY,	
Artificial—power of Congress over	19
Of interstate commerce	18
Power of Congress to construct	29
Power of State over	70
INCOME	
Of railway Company, power of State to tax	89, 90
Tax on, contrasted with gross receipts tax	90
INSTRUMENTALITIES OF COMMERCE,	
Power of Congress over	5, 17, 23
Power of State over	56
Power of State to tax	77
Regulations of, when regulations of commerce	60
INTERNAL COMMERCE	
By means of interstate transportation	51
How defined	48
Power of Congress over	10, 11
Power of State over	47, 50, 66
INTERSTATE COMMERCE,	
Corporations engaged in, rights and duties of	32, 56
Crimes against	24
Highways of	18
Railroad engaged in, rights and duties of	26
Railroad engaged in, test of	26, 49
State cannot levy tax on	77, 83
State cannot regulate	45

INTERSTATE COMMERCE.	SECTION.
State laws making discrimination against	87
State laws indirectly burdening	74
Telegraph business is	82
Vehicle of	17, 18, 20
What constitutes	7, 49
When commences	8, 49
(See <i>Power of Congress.</i>)	
(See <i>Power of State.</i>)	
(See <i>Railroad.</i>)	
(See <i>Transportation.</i>)	
INTERSTATE COMMERCE ACT,	
Changes recommended in	107
Constitutionality of	14
Constitutionality of proposed changes in	108
Difficulty of enforcing	106
Proposed amendments to	38
Proviso to	25
Railroads subject to	25
Relation of Circuit Courts to	110
Scope of	9, 27
Unequal operation of	12
INTERSTATE COMMERCE COMMISSION,	
Attitude of courts towards	105
Effect of findings of	38, 105, 110
Opinion of, as to the scope of the Act	27
Proposed change in constitution of	110
Qualifications of, for dealing with legal questions	111, 112
LAND,	
Power of Congress to open ways of communication by land	29
LEGISLATURE,	
Power of, to fix rates	39
LICENSE,	
Power of State to demand, for railroad office	83
Power of State to require railroad agent to take out	83
Power of State to require railroad engineer to take out	57
LIMITATIONS	
On power of Congress under the Commerce Clause	33
On taxing power of the States	77, 92

MANAGEMENT	SECTION.
Of railroad—power of Congress over	23
Of railroad—power of State over	75
MARSHALL, CHIEF JUSTICE,	
Comments on Commerce Clause	2, 10
On nature of representative governments	41
On police power	46
On State taxing power	77
MATTHEWS, JUSTICE,	
On taxation of rolling-stock	99
MILLER, JUSTICE,	
On franchise tax	81
On internal commerce	47
NATURAL GAS,	
State laws regulating transportation of	60
NAVIGATION,	
Power of Congress to improve	28
Power of Congress to regulate	17-19
OFFICE,	
License tax upon railroad	83
OPERATION	
Of railroad—power of Congress over	23, 35
Of railroad—power of State over	35, 56, 70, 75
PACIFIC RAILROAD, THE	
Power of State to tax	92
Under what authority constructed	29
PARLIAMENT,	
Acts of, regulating commerce	16
PASSENGERS,	
Transportation of, is commerce	1
PAXSON, CHIEF JUSTICE,	
On taxation of personal property	93
POLICE POWER	
Does not authorize regulation of commerce	46
What laws are legitimate exercises of	63

POLICE REGULATIONS	SECTION..
Amounting to regulations of commerce	60
Corporations engaged in interstate commerce subject to	56-59
Embarassment to commerce from	101
Test of constitutionality of	68
(See <i>Power of State.</i>)	
POWER OF CONGRESS.	
Effect of non-exercise of	42, 78
Over artificial highways of commerce	19
Over canals	18, 19
Over commerce—character of	3
—extent of	2, 10, 14
—limitations on	33
—not dependent on compensation	35
—not confined to direct regulations	4
Over high seas	18
Over instrumentalities of commerce	5, 17, 23
Over internal commerce	10, 11
Over internal transportation	49
Over rivers	19, 28
Over transportation by land	29
Railroads subject to	25, 26
To charter railroad companies	29-32
To construct railroads	29
To grant right of eminent domain	31
To improve facilities of commerce	28
To legislate upon brakes, couplers, etc.	21, 22
To prescribe manner of conducting commerce	23, 35
To prohibit use of stoves in cars	22
To punish crimes against commerce	24
To regulate construction of cars	20
construction of roadbed	23
navigation	17-19
railroads	23-26, 33, 35
rates	34
vessels	17-18
To revise State legislation	102

POWER OF STATE.

SECTION.

Effect of Commerce Clause upon	42
Effect of fourteenth amendment on	34
Injurious effect on commerce of unwise exercise of	101
Limitations upon	34, 40, 60, 77, 92
Over accommodations furnished by railroad	64, 66-68
corporations chartered by Congress	29, 32, 92
corporations engaged in interstate commerce	29, 32, 56, 69
foreign corporation	32, 92
internal commerce	46, 47, 50, 66-68
internal commerce by means of interstate transportation	51-54
internal transportation	43, 45, 50
instrumentalities of commerce	56
Remedy for unwise exercise of	102
To change commerce law as to carriers	58
To compel use of air-brakes, couplers, etc	69, 71, 75
To levy tax discriminating against interstate commerce	87
To levy privilege tax on sleeping-cars	97
To make police regulations	46, 61, 63, 65, 70
To prohibit discrimination against colored persons	60, 67
To prohibit use of car stoves	75
To regulate conduct of common carriers	59
construction of cars	70, 71, 75
construction of railroad	70
contract of transportation	60-63
obligations of telegraph companies	61
operation of railroad	35, 56, 70, 75
rates, etc.	34-40, 60, 101
rights and duties of railroad companies	57-59
stopping of trains	65
To require license for railroad office	83
license for railroad ticket agent	83
railroad engineers to take out license	57
To tax capital stock of railroad company	82, 83
corporations	77, 78
every ton of freight carried	79
foreign corporations	88
franchises	81, 84, 85

POWER OF STATE.	SECTION.
To tax freight cars	98-100
gross receipts of transportation company	80-85
income of corporations engaged in interstate commerce	89, 90
instrumentalities of commerce	77, 78
limitations on	77, 78
property of corporations engaged in interstate commerce	86, 88, 93
railroad company chartered by Congress	92
railroad company for every ton of freight carried	79
rolling-stock	94-100
sleeping-cars	94-97
telegraph companies	79, 82, 88
What commerce under	54
When commerce within State not under	49, 102
When internal transportation not under	49
PRIVATE PROPERTY,	
How far charges for transportation are	34
How far railroads are	35-40
PROPERTY	
Used for purposes of interstate commerce—power of State to tax	86-88
Situs of, for purposes of taxation	93
RAILROAD	
Agent—license tax upon	83
Chartered by Congress—rights and powers of	29-32
Engineer—State law requiring license for	57
How far private property	35-40
Local business on, subject to State control	66-68
Office—license tax upon	83
Power of Congress over	23-26
to construct	29
to regulate charges of	34
equipment of	35
operation of	23
Power of State over accommodation of	64, 66-68
construction of	90
operation of	56-59, 70, 75
rights and liabilities of	57, 78

INDEX.

161

RAILROAD

SECTION.

Tax on every ton of freight carried by	79
Uniformity of regulation of, necessary	43, 72
What business on, subject to State control	50, 51, 66
What transportation on, is interstate commerce	26
When subject to Interstate Commerce Act	25
When subject to power of Congress	26

RAILROAD COMPANIES

Chartered by Congress—State taxation of	92
Congress may give power of eminent domain to	31
Consolidation of, legal and political aspects of	103
Entitled to compensation	37, 39
Legislative interference with business of	41
Power of legislature over charges of	34-39
Taxation of capital stock of	82, 83
franchise of	81, 84, 85, 92
gross receipts of	80-85
net income of	89, 90
property of	86-88, 93
rolling-stock of	94-100

RAILROAD COMMISSION,

Power of, to fix rates	37
Weight to be given decision of	39, 40

RATES AND FARES,

Extent of power of legislature over	39
railroad commission over	37
Must afford compensation	39
Reasonableness of, how determined	37, 108
Regulation of, is regulation of commerce	44
State cannot prohibit discrimination in interstate	46, 60

REGULATE COMMERCE.

Meaning of phrase	35
Origin of phrase	16
Power to, not dependent upon compensation	35
State cannot, under police power	45, 46, 60
State cannot, under taxing power	77, 81

(See *Power of Congress.*)

(See *Power of State.*)

REGULATION OF COMMERCE.

SECTION

Discriminating tax is	87
Division of the laws under the head of	6
Laws incidental to the	4
Not equivalent to confiscation	39
Regulation of contract of transportation is	44
Regulation of rates is	44
Tax amounting to	77, 78
Tax on every ton of freight carried is	79
Tax on net income is not	89
Tax on telegraph messages is	79
When regulation of instrumentality is	60

RIGHTS AND LIABILITIES,

Of persons and corporations—power of State to regulate	57-59
--	-------

RIVERS.

Foundation of Congressional power over	19
Power of Congress to improve navigability of	28
Power of Congress to regulate navigation on	19

ROAD-BED.

Analogy of, to stream	23
Power of Congress over	23
Power of State over	70, 75

ROLLING-STOCK.

Power of Congress to regulate construction of	20-23
Power of State to regulate construction of	64, 66-71, 75
Taxation of	94-100
(See <i>Power of Congress.</i>)	
(See <i>Power of State.</i>)	

SAFEGUARDS.

Power of Congress to require	20-22
Power of State to require	59

SILENCE OF CONGRESS.

Interpretation of	42, 78
-----------------------------	--------

SLEEPING CARS.

Regulations as to	68
Taxation of	94-96

STATE

SECTION.

Cannot deprive carrier of right to reasonable rates	37-39
Cannot regulate interstate commerce	43, 45, 46
Cannot regulate interstate transportation	49
Consent of, when corporation may act without	29-32
(See <i>Power of State.</i>)	

STATE LAWS.

Changing common law as to carriers	58
Conflicting with Federal laws	55
Discriminating against interstate commerce	87
Effect of conflict between	72, 73
Indirectly burdening interstate commerce	74, 101
Interfering with freedom of commerce	44
Prohibiting discrimination against colored persons	60, 67
Prohibiting running of freight trains on Sunday	60n
Regulating accommodations furnished by common carrier	64, 66-68
conduct of citizens	56, 59
contract of transportation	60-63
instrumentalities of commerce	56-60, 69
local commerce	66-68
rates and fares	34-41
rights and liabilities	57-59
stopping of trains	65
Remedy for evils arising from conflicting	76, 102
Subordination of, to laws of Congress	32, 55, 102
Test of constitutionality of	63
(See <i>Power of State.</i>)	

STATE LINES,

As determining the character of commerce	13
--	----

STRONG, JUSTICE,

On limits of State taxing power	77
On scope of police power	56

SUNDAY.

State law prohibiting running of trains on	60n
--	-----

TAX

Discriminating against interstate commerce	87, 97
Limitations on State power to	77, 78, 92

TAX	SECTION.
On capital stock	82, 83
On domestic corporation	77, 78
On every ton of freight carried	79
On foreign corporation	88
On franchise	81, 84, 85, 92
On freight cars	98-100
On gross receipts	80-85
On net income	89, 90
On privilege of carrying on interstate commerce	97
On property of corporation	86-88, 93
On railroad chartered by Congress	92
On railroad office and ticket agency	83
On rolling-stock	94-100
On sleeping cars	94-97
On telegraph messages	79
TELEGRAPH COMPANIES.	
Power of State to regulate contracts of	61
Tax on gross receipts of	82
Tax on property of	88
TEST	
Of article of interstate commerce	8
Of character of commerce under State control	50
Of character of transportation	8, 49
Of railroad under Congressional control	26
Of validity of State police law	63
TRAINS.	
Express, power of State to compel stopping of	65, 66
Power of Congress to regulate equipment of	20-23
Power of State to regulate equipment of	69-71, 75
Relations of cars in	21
Relation of local, to through	22
Uniformity of apparatus on cars in	21
TRANSPORTATION,	
Charges for, not private property	34
Contracts for, when interstate	26
In form interstate, but commerce internal	51
In form local, but commerce interstate	11

TRANSPORTATION.

	SECTION.
In pursuance of through contract	7, 8, 49
Land, power of Congress over	29
Relation of police power to	46
State cannot regulate interstate	43
State laws regulating contract of	60-63
State may regulate physical elements of	56
Synonymous with commerce	6
Test of the character of	8
Water, analogy to land	20
When under State control	49
Which Congress may regulate	7
Within State, but not under State control	49
(See <i>Power of Congress.</i>)	
(See <i>Power of State.</i>)	

TRANSPORTATION COMPANIES.

Power of State to tax franchise of	85
Power of State to tax gross receipts of	81-85

VEHICLES OF COMMERCE

By land	17, 18
By water	20

VESSELS

Engaged in internal commerce	17
Power of Congress over, unlimited	20
What under power of Congress	7, 17, 18
Where taxable	88

WAITE, CHIEF JUSTICE,

On division between powers of Congress and State	62
--	----

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